TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[redacted]

No. [redacted] 59

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. F. AND T. C. RANKIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JANUARY 24, 1914.

(24,029)

(24,029)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 344.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. F. AND T. C. RANKIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

	Original.	Print
Caption	1	1
Transcript from the circuit court of Hamilton county	3	1
Writ of summons	4	1
Cost bond	4	1
Declaration	5	2
Order allowing time to file plea	9	5
Stipulation as to exhibits, etc.	9*a*	5
Exhibit 1—Bill of lading, C., N. O. & T. P. Ry. Co. to D. F. Rankin	9*b*	5
Plea and special pleas	10	11
Motion to file additional pleas	14	13
Special pleas	14	14
Agreed order as to pleadings	18	16
Motion to amend declaration	18	16
Declaration amended	19	16
Issue joined on pleas	20	17
Jury respital	20	17
Final judgment	20	17
Additional time for filing motion for new trial	21	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1914.

	Original.	Print
Motion for new trial made	21	18
Motion overruled and appealed	21	18
Motion for new trial	22	19
Appeal bond	25	21
Bill of exceptions	27	21
Testimony of J. L. Henry	28	22
D. F. Rankin	35	26
Robert C. Rankin	50	35
H. L. Pense	57	39
David Rankin	59	41
Stipulation as to depositions	63	43
Deposition of J. H. Goggin	64	44
Wilson Alexander	68	46
Montie Fox	72	49
Jake Robinson	76	51
Stenographer's certificate to depositions	81	54
Testimony of D. F. Rankin (recalled)	83	55
C. L. Hayes	85	56
M. L. Hartman	87	57
Charley Hawkins	105	68
Charge of the court	112	72
Verdict	113	73
Judge's certificate to bill of exceptions	114	73
Rule docket entry	115	74
Bill of cost	116	74
Clerk's certificate	117	75
Proceedings in the court of civil appeals	118	75
Assignment of errors and brief for plaintiff in error	118	75
Reply brief of defendants in error	146	91
Opinion, Moore, J.	162	100
Judgment	181	111
Notice of application for certiorari	182	112
Petition for writ of certiorari	183	113
Writ of certiorari	190	117
Bond on writ of certiorari	191	117
Supersedeas order	192	118
Assignment of errors and brief of the petitioner	193	118
Reply brief of defendants in error	256	152
Supplemental brief for the defendants in error	271	161
Supplemental brief for the petitioner	277	164
Judgment	279	165
Clerk's certificate	280	166
Petition for a writ of error	281	1 7
Order allowing writ of error and fixing bond	308	180
Bond on writ of error	309	180
Assignment of errors	311	181
Waiver of citation	315	184
Writ of error	316	185
Certificate of lodgment	318	186

1 & 2 Circuit Court, Hamilton County.

Filed May 7, 1913. S. E. Cleage, Clerk; Jas. T. Joy, Deputy Clerk.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
Plaintiff in Error,
vs.
D. F. RANKIN and T. C. RANKIN, Defendants in Error.

Attorneys for Plaintiff: Pritchard, Allison & Lynch.
Attorney for Defendants: W. B. Miller.

3 *Pleas of Trial Term.*

STATE OF TENNESSEE,
Hamilton County:

Pleas at a Circuit Court, Begun and Held at the Court-house, in the City of Chattanooga, said State and County, on the First Monday in January, 1913, the Same Being the 6th Day of said Month.

Present and presiding the Hon. Nathan L. Bachman, Judge of the Sixth Judicial Circuit of Tennessee, duly elected, commissioned and qualified, when the following proceedings were had, to-wit:

4 *Writ of Summons.*

Circuit Court of Hamilton County.

STATE OF TENNESSEE:

To the Sheriff of said County:

You are hereby commanded to summons The Cincinnati, New Orleans & Texas Pacific Railway Company, W. J. Turner and M. S. Hartman, if to be found in your County, to appear before the Circuit Court, to be held for County of Hamilton, at the Court House in Chattanooga, the first Monday in May next, then and there to answer D. F. Rankin for use of Thomas O. and D. F. Rankin, also Thomas and D. F. Rankin, as individuals in an action of samage in the sum of $5,000.

Witness Chas. L. Hayes, Clerk of said Court, at office in Chattanooga, the first Monday in January, 1912.

CHASL. L. HATES, *Clerk.*

Cost Bond.

We hereby acknowledge and bind ourselves for the prosecution of the above suit, and payment of all costs at any time adjudged against plaintiff.

This April 22, 1912. W. B. MILLER.

1—344

Endorsed: Rule Docket V. Docket page 264, #19944. Writ of Summons from Circuit Court at Chattanooga. D. F. Rankin et al vs. C., N. O. & T. P. Ry. Co. et al. Issued April 22*m* 1912, Chas. L. Hayes, Clerk. Came to hand same day issued. Executed by reading and making known the contents of this summons to W. C. Shepherd, Agent of the C., N. O. & T. P. Ry. Co. and summoning defendant as commanded. This April 30, 1912. J. R. Henderson, D. S. Plaintiff's Attorney, W. B. Miller.

5 *Declaration.*

Filed August 23, 1912.

THOMAS C. RANKIN, etc.,
vs.
C., N. O. & T. P. RY. CO.

The plaintiffs Thomas C. Rankin and D. F. Rankin (The latter of whom sues for the joint use and benefit of himself and Thomas C. Rankin) sue the defendant, a corporation, and for cause of action aver:

First Count.

That on or about the 6th day of November, 1911, the plaintiffs, by and through plaintiff D. F. Rankin delivered to defendant, in good condition, nineteen mules, the property of plaintiffs, to be transported by defendant over its own and connecting lines of railroad, and delivered to plaintiff D. F. Rankin in Atlanta, Georgia.

Defendant was a common carrier, operating a line of railway over which it transported freight for hire, enjoying special franchises and privileges as such; and plaintiffs delivered the mules as aforesaid to defendant as such common carrier, at Danville, Kentucky, a station on defendant's line, agreeing to pay the full freight or tariff charged by defendant for such transportation, on delivery of said mules at the point of destination; and defendant accepted said mules for transportation on the terms aforesaid and agreed and became bound to safely transport and deliver them in the same sound condition in which they were received at the place aforesaid:

But defendant wholly failed to deliver said mules or any of them at the point of destination, as it agreed and was bound to do, but instead, wrongfully and negligently failed and refused to do so, and in fact negligently wounded, maimed, bruised and it is believed killed all or a portion of said mules, and failed and refused to
6 deliver any of them at destination, and plaintiffs have thereby lost the full value of all of said mules, which were reasonably worth the sum of $250.00 each, over and above the cost and expense of transportation, and the nineteen mules aforesaid were worth the sum of $4,750. for which sum, with interest and costs, the plaintiffs sue and demand a jury to try this cause.

CHAS. C. FOX,
W. B. MILLER,
Attorneys for Plaintiffs.

Second Count.

And the plaintiffs, for further cause of action, aver that on or about the date aforesaid the said plaintiffs Thomas C. Rankin and D. F. Rankin were jointly the owners of nineteen head of mules, and on said date said D. F. Rankin, acting for himself and his co-plaintiff, delivered said mules, together with some other mules and horses, all being in sound condition, to defendant, which was a common carrier for hire, as alleged in the First Count, at Danville, Kentucky, a station on defendant's line of railway, to be transported by defendant over its own line to Chattanooga, Tennessee, and there delivered to a connecting carrier, to be transported to Atlanta, Georgia, and there delivered to plaintiff D. F. Rankin.

Said D. F. Rankin agreed to pay the full freight tariff demanded by defendant for such transportation upon delivery of said mules and horses at destination, Defendant accepted said stock for transportation and delivery on the terms aforesaid, and became bound to safely transport and deliver them, as stipulated, *on* the sound condition in which they were received.

Defendant executed and delivered to D. F. Rankin a written receipt, or bill of lading, copy of which is hereto the Court shown, being filed as Exhibit No. 1 hereto, in which defendant acknowledged the receipt of said mules and horses for transportation
7 and delivery to said plaintiff, and in and by which said defendant undertook and attempted to stipulate that in case of loss or damage to said stock, defendant should not be liable for more than $75. for each animal. Said limitation was not called to the attention of either of plaintiffs, and neither of them assented to or knew of the same; and they aver that the whole of said paper, and especially the $75. limitation, is void and of no effect and is not operative or binding on them or either of them, for the following, among other, reasons:

1. Because said contract of shipment was made in the State of Kentucky, and the rights of the parties thereto are to be measured and controlled by the laws of said State; and under the constitution, laws and decisions of the Courts of Kentucky, the said stipulation, undertaking to limit the liability of the carrier to less than the actual value of the property, is contrary to public policy and absolute- void; hence, plaintiffs are not bound thereby.

2. Independent of the Constitution, laws and decisions of Kentucky, such limitation, in order to be valid or effective, must be reasonable; and the said stipulation in the bill of lading in this case is grossly unreasonable and unjust, in that it undertakes to fix and limit the value of all horses and mules, without discrimination or distinction, at "not exceeding, $75. each"; whereas, the mules belonging to and shipped by the plaintiffs, as aforesaid, were worth at least three or more times as much as $75. each.

3. No other contract of transportation was mentioned or offered to plaintiffs, nor did they or either of them have any knowledge or information that the shipment was to be made at a reduced rate and under a stipulation for limited liability, nor was any option given to ship either under a common law contract, without limitation on

the amount of liability, or under the contract as actually de-
8 livered; nor was any option whatsoever offered them, or brought to the attention of them or either of them.

4. There was no consideration whatever to sustain said limited liability stipulation.

5. The defendant and plaintiffs were not on the same or an equal footing, in that defendant, together with its connecting carriers, owned the only direct line of railway from Danville, Kentucky, the home of plaintiffs, where said stock then was to Atlanta, Georgia and could practically dictate terms to plaintiff in the matter of transportation.

The statement in said Exhibit 1 "That the published freight rates on live stock of said carrier are in all cases based upon the following maximum valuations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for", plaintiffs are advised is wholly untrue and same was not brought to their attention, nor was it assented to by them.

The further statement or recital therein "that the tariff regulations of said carrier provide that for every increase of 100 per cent or fraction thereof in the above valuations there shall be an increase of 50 per cent, in the freight rate", as plaintiffs are advised and charge, was and is wholly untrue.

The recitals aforesaid appear in item 3 of said Exhibit 1, and plaintiffs charge that they are unjust, untruuthful, discriminatory, arbitrary and unreasonable.

Wherefore, plaintiffs aver that said item 3 aforesaid, and especially the valuation of $75.00 therein, are absolutely void.

The plaintiffs aver that defendant wholly failed to perform said contract of transportation; that it did not deliver said horses
9 and mules, or any of them, to the connecting carrier at Chattanooga, Tennessee, but that the car in which said mules and horses were being transported was wrecked, because of the negligence and car-lessness of defendant, on the line of defendant's railroad, near the town of Dayton, Tennessee, *which* in defendant's possession, and a number of said mules and horses were killed and the remainder were *si* badly damaged as to be almost worthless; and defendant sold all of said animals which had not been killed and appropriated and converted the proceeds of sale, and still retains and has never accounted for the same.

The nineteen mules belonging to the plaintiffs as aforesaid, which w*w*re included in the shipment as aforesaid, were worth $250. each, over and above the cost and expense of transportation and the nineteen mules aforesaid were worth $4,750. for which sum, together with interest, the plaintiffs sue and demand a jury to *r*ry this cause.

CHAS. F. FOX,
W. B. MILLER,
Attorneys for Plaintiffs.

Ten Days Allowed to File Plea.

Entered Oct. 18, Sept. Term, 1912.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

By order of the Court ten days are allowed in which to file plea.

9a Filed July 8, 1913. S. E. Cleage, Clerk.

No. 23. Hamilton Law Docket.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
D. F. RANKIN and T. C. RANKIN, Defendant- in Error.

In this cause, it appearing that the Clerk of the Circuit Court of Chattanooga, in making out his transcript of the record, has ommitted to copy into the transcript a copy of the bill of lading filed as exhibit No. 1 to the declaration of the defendants in error, D. F. & T. C. Rankin, it is therefore agreed that the attac-ed appear as a correct copy of the bill of Lading as filed as exhibit No. 1 to the declaration and read in evidence on the trial of this cause, and marked Exhibit "A" to this agreement and be treated as part of the transcropt of the record in this cause.

It further appearing that the Clerk, by mistake, omitted to copy the Act of Legislature creating the municipality of the town of Dayton, which was called for on page 26 of the transcript and introduced by witness J. L. Henry said Act being Ch. — of the Acts of — may ne read from the published acts as if same was embodied in the transcript in thus cause.

This 23rd day of June, 1913.

W. B. MILLER,
Attorney for Rankin.
PRITCHARD, ALLISON & LYNCH,
Attornyes for C., N. O. & T. P. Ry. Co.

9b (Copy of Bill Lading.)

Form 4557, 50 Bks. (25 lvs.) 9-7-10 S. & C.

Cincinnati, New Orleans & Texas Pacific Railway Co.

Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates.

DANVILLE, KY., STATTION — 11/6, 191–.

This contract made and entered into on the above date by and between the Cincinnati, New Orleans & Texas Pacific Railway Com-

pany, (hereinafter called the carrier), and D. F. Rankin, (hereinafter called the shipper).

1. Consignments. Witnesseth: That the said shipper has delivered to the said carrier live stock of the kind, description and number indicated below, to be carried by said carrier to —— ——, a point on his line and thence as agent of the shipper to be forwarded by connecting carrier to the following consignee and destination via the route indicated:

Numbers and initials of cars.	Consignee, destination, and route.	Number, kind, and description of live stock (shippers' load and count).	Weight, subject to correction.
C. N. O. & T. P. 9390	D. F. Rankin, c/o Miller Union Stock Yards Cutuba, Ga.	27 mules 2 horses S. L. C.	

Charges advanced and which shipper agrees to pay at destination, $— Via Southern Ry. 36 hours' limit.

2. Carrier's Liability on his own line only. It is understood and agreed by said shipper that said carrier's liability extends to the destination of said stock only when said destination is on the line of the C., N. O. & T. P. Ry.; otherwise such liability extends only to the station where said live stock is to be received by connecting carrier for transportation to or toward destination, and said carrier's liability shall cease when said live stock is ready to be delivered to owner or consignee, or to connecting carrier whose line may constitute a part of the route to destination.

3. Limit of value. That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

Stallions or Jacks, not exceeding	$150.00	each
Horses or Mules, not exceeding	75.00	
Mare and Colt together, not exceeding	100.00	
Ponies, not exceeding	40.00	
Cattle, except yearlings, not exceeding	30.00	
Cow and Calf together, not exceeding	35.00	
Yearling Cattle, not exceeding	20.00	
Hogs, Pigs, Calves, Sheep or Lambs, not exceeding	5.00	each
9c Turkeys, not exceeding	1.50	doz.
Geese, not exceeding	1.00	"
Chickens, Ducks, or Guinea Fowls, not exceeding	.75	"

That the tariff regulations of said carrier provide that for every increase of one hundred percent, or fraction thereof, in the above valuations, there shall be an increase of fifty percent in the freight rate; and

That the said shipper in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for.

4. Guaranteed freight rate.

That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations is $— per — from —— —— to —— —— and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc.

Agents will strike out (in ink) clause 5, except where rules authorize free transportation.

5. Free transportation of attendants when authorized by rules.

That the said carrier, in order to enable said shipper to personally take proper care of said live stock while in transit, shall provide said shipper free transportation for himself or his agent from —— —— to —— —— (station at which freight leaves rails of co. provided said live stock is in the amounts of one or more carloads, and that in consideration of such free transportation said shipper assumes the entire care of said live stock while in transit; that said carrier's employes, so far as they shall assist said shipper or shall, in said shipper's absence, act for him, shall be deemed the agents of said shipper and not of *said shipper and not of* said carrier; and that said carrier shall in no wise be responsible for loss resulting from their mistakes; that said shipper assumes the charge of said stock not only while in the car, but also while in the stock pens of said carrier; and release said carrier from all claims whatsoever for loss or damage sustained by said stock while in said pens, or while transfer is being made between the pens and the cars; and

That said shipper, in consideration of said free transportation, shall and will indemnify and save harmless said carrier from all claims, liabilities and demands of every kind, nature and description by reason of personal injury sustained by said shipper, or his agent or agents, so in charge of said stock.

If said live stock is less than a carload, said shipper or his agent, in accompanying said live stock, shall pay full passenger fare.

6. That the said shipper shall inspect the car
Inspection of cars. or cars provided by said carrier for the transportation of said live stock and shall, before shipment, satisfy himself that said cars are in good order and suitable and sufficient for said transportation; and that said carrier shall not be liable on account of loss or injury to said live stock happening by reason or alleged insufficiency in or defective condition of the body of said car or cars.

9*d*

7. That said shipper shall see that all doors and
Shipper to keep opening closed. openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of said stock, and said carrier shall not, under any circumstances, be liable on account of the escape of any of said stock through said openings.

8. That in case said carrier permits shipments of
Double decks and partitions. live stock in double deck cars, or in cars subdivided by partitions to separate different kinds of stock, said shipper agrees to provide said decks or partitions, at his own expense, and to assume all liability for loss or damage caused by the use of said decks or partitions, whether on account of their improper or insufficient construction, or otherwise.

9. That said shipper agrees to provide at
Bedding Loss from improper loading, etc. his own expense such bedding or other suitable appliances in said car or cars as will enable said stock to stand securely on its feet, and said shipper hereby releases said carrier from all liability for or on account of any injury or injuries which said stock, or any one of them, may receive in consequence of any animal or animals composing said stock failing to keep their feet; or, in consequence of any of them being wild, vicious, unruly or weak; or, in consequence of heat, suffocation, or other ill effects of being crowded in said cars; or, in consequence of being injured by burning hay, straw or other material used by said shipper or his agents for feeding or bedding said stock; or in consequence of being injured by heat, cold, or any change in weather.

10. That said shipper releases said carrier from
Loss from delays. all damage, injury, or loss which may be sustained by reason of any delay or detention in transportation nor resulting from negligence of said carrier or his agents, whether they result from any mob, strike or threatened violence to person or property from any source, or from stress of weather, or from any cause whatsoever beyond said carrier's control; and, it is agreed, that in case o*d* delays as above described, not the result of negligence on the part of said carrier that the said shipper shall feed, water and take other proper care of said stock at his own expense and,

That said carrier, while using all reasonable effort for the prompt transportation of said stock, does not guarantee to place it in any market at any specified time.

11. Stops for feed and water. That while said carrier agrees to stop his trains at such points as will enable said shipper to comply with the law by feeding and resting said stock at proper intervals, said carrier shall not delay his trains longer than is necessary to leave said stock at such proper stations, and the time elapsing until the next available train of said carrier shall not be deemed a delay; and if said shipper, or his agent or agents, shall fail or refuse to reload said stock within a reasonable time for so doing after cars have been placed ready to receive the same, then said carrier may in his option consider this contract as abandoned by said shipper and said carrier may collect the local rate for the transportation already furnished.

9e

12. Evidence of Ownership. That the presentation of this contract shall be sufficient evidence of ownership to release said carrier from all liability on account of wrong delivery, but shall not prevent said carrier from demanding (if he so elect) the identification of the party presenting the contract before making delivery of said stock.

13. Claims for damages. That no claims for damages which may accrue to said shipper under this contract shall be allowed or paid by said carrier, or claimd, or sued for in any court by said shipper, unless said shipper gives prompt notice of said damages to the nearest agent of said carrier, thereby enabling said carrier to make an inspection of the stock alleged to be damaged; and, unless claim for such loss or damage shall be made in writing and verified by an affidavit of said shipper, or his agent, and filed with the Freight Claim Department of said carrier in the city of Cincinnati within five days from the time said stock is removed from said car of cars.

14. Contract with connecting carrier. That if the destination of said stock is beyond the line of said carrier, and in order to reach said destination said stock must be transported over the lines of any other carrier or carriers, delivery of said stock may be made to said connecting carrier or carriers upon such terms and conditions, not affecting the rate of freight hereinbefore expressed, as said connecting carrier or carriers may be willing to accept, provided that the terms and condition- of this contract shall inure to such connecting carrier or carriers, unless they shall otherwise stipulate.

In witness whereof, the agent of the Cincinnati, New Orleans & Texas Pacific Railway Company, and the owner of the stock, or

his authorized agent, have set their hands to this agreement and to a duplicate thereof.

D. F. RANKIN, *Owner.*
W. J. COUGHLIN,
Agent of C., N. O. & T. P. Ry. Co.

Witness:
C. W. SMITH, JR.

(To be other than agent or owner.)

The attention of train conductors is especially directed to clause 8. They will refuse to move cars containing mixed shipments of stock until proper partitions are placed therein.

Cincinnati, New Orleans & Pacific Ry. Co.

Live Stock Contract.

From ——.
To ——.
Via ——.
Shipper —— ——.
Consignee —— ——.
Car Nos. —.
Way-Bill Nos. —.
Date —— —, ——.
Number of men in charge —.

9*f* Agents will strike out (in ink) following section, *section* except where rules authorize free transportation.

In consideration of the free transportation furnished by the C., N. O. & T. P. Ry. Co. to enable us to accompany and take charge of the live stock mentioned in this contract we, the undersigned, being the persons in charge of said stock, hereby agree that the said Railway Co. shall not be liable to us for injury or damages of any kind suffered by us from trains of said Railway or from any other cause whatsoever.

Witness our hands this — day of ——, 191–.

—— ——,
—— ——,
—— ——,
—— ——,

Names of Men Actually in Charge of Stock.

Witness:
—— ——,

(To be other than the parties to this contract.)

10 *Plea and Special Pleas.*

Filed November 25, 1912.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

I.

The defendant Cincinnati, New Orleans & Texas Pacific Railway Company for plea to the plaintiff's declaration says that it is not guilty in manner and form as the plaintiff in his declaration hath alleged.

II.

For further plea defendant says that it did not breach the contract of carriage, as the plaintiff in his declaration hath alleged.

III.

For further plea defendant denies that any part of the contract of shipment filed as Exhibit "A" to the plaintiff's declaration is void for any reason, but says that said contract is valid and binding and pleads the same as a complete bar to plaintiff's right to recover in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment.

IV.

To so much of said declaration as avers that the contract, Exhibit "A" to plaintiff's declaration, is void and of no effect for the reason that said contract was made in the State of Kentucky and that under the Constitution, Laws and decisions of the court of Kentucky the stipulation containing the limited valuation clause is invalid, the defendant for plea says:

(*a*) That the contract exhibited with the plaintiff's declaration shows that the contract was not to be wholly performed in the State of Kentucky, but was to be partly performed in the States of
11 Tennessee and Georgia; that the injury complained of occurred in the State of Tennessee, and therefore the Constitution and laws of Kentucky would not govern, and the rights of the parties under the contract are not to be determined by the Constitution and laws of Kentucky.

(*b*) That the contract for the breach of which recovery is sought is an interstate contract, providing for the shipment of live stock from Danville, a point in the State of Kentucky to Atlanta, a point in the State of Georgia; that the validity of said contract is not governed by the Constitution or laws of the State of Kentucky, and that said contract is valid and binding upon plaintiff and defendant, and defendant relies upon the conditions thereof as a complete bar to any recovery in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment.

V.

For further plea to so much and such parts of the plaintiff's declaration as charge that the contract filed as Exhibit "A" to plaintiff's declaration is invalid because (*a*) the contract is unreasonable; (*b*) no other contract of transportation was offered to plaintiff, or no option given to plaintiff to ship under a common law contract without limitation on the amount of liability; (*c*) that there was no consideration to sustain the limited liability stipulated in the contract; and (*d*) that the plaintiff did not assent to the terms of said contract, defendant says that said contract is not invalid for these or any other reasons, but the same is valid and binding, having been entered into freely and knowingly by the plaintiff; the plaintiff having at the time said contract was entered into the option of shipping said stock under the contract executed, which is filed as Exhibit "A" to plaintiff's declaration, or under a contract of common law liability at a higher freight rate, which was also reason-
12 able.

VI.

Defendant for further plea says that it is a common carrier subject to the provisions of the Act of Congress regulating interstate commerce approved February 4, 1887, and the amendments thereto; that prior to the shipment of horses and mules as set out in plaintiff's declaration it had duly filed in the office of the Interstate Commerce Commission, as required by said Act of Congress, schedules of joint rates showing the rates and charges for transportation of live stock between different points on its own road, and between points on its own road and points on connecting roads between Danville, a point in the State of Kentucky and Atlanta, a point in the State of Georgia, and had printed and kept open to the public inspection at Danville such schedules showing the rates and charges for transportation of live stock, including horses and mules, between Danville, Kentucky and Atlanta, Georgia; that said schedules contained the classification of freight in force and stated separately all the terminal and other charges, as required by said Act of Congress, and the rules and regulations of the Interstate Commerce Commission, which provided that the freight rate in carload lots upon horses and mules from Danville, Kentucky to Atlanta, Georgia, where the value of said horses and mules did not exceed $75.00 each should be $95.00 per car, and that said regulations also provided that for every increase of 100 per cent or fraction thereof in said valuations there should be an increase of 50 per cent in the freight rate. Plaintiff knowing these facts and in order to avail himself of said minimum freight rate of $95.00 fixed the value of each of said mules so shipped by him at $75.00 and represented to defendant that this amount was the just and true value of said animals. The defendant had no knowledge or means of knowing as to the value of said animals except as
13 the same was derived from the plaintiff or his agent; and plaintiff is now estopped from denying that said valuation as thus fixed by him and upon which is obtained said minimum freight rate is unjust or unreasonable, and if liable for any amount defend-

ant pleads these facts as a bar to any recovery in excess of $75.00 for each mule so injured in said shipment.

VII.

Defendant for further plea says the contract of shipment for breach of which recovery is sought was a contract for the shipment of mules from Danville, a point in the State of Kentucky, to Atlanta, a point in the State of Georgia. The schedule of freight rates in effect at the time of said contract was made from Danville, Kentucky to Atlanta, Georgia, in proper form had been filed with the Interstate Commerce Commission as provided by law prior to the time of these shipments, showing that the rates therein mentioned were based upon the valuation of not exceeding $75.00 for each mule or horse, and that the shipper is required to declare the valur, and when the value so declared is in excess of $75.00 per head an additional charge is made as provided in the classification which is a part of said schedule. Said schedule and the tariff regulations, approved by said Interstate Commerce Commission and in effect at the time, provided that for every increase of 100 per cent or fraction thereof in said values there should be an increase of 50 per cent in the freight rate. The rate charged on this shipment was based upon the valuation of $75.00 for each mule, as declared by plaintiff. Defendant had no knowledge of the actual value of said mules, nor any means of knowing the true value of the same, but relied entirely upon the value declared by the plaintiff in said contract; and the defendant for plea says that
14 — the actual value of said stock was more than $75.00 the plaintiff has been guilty of a wilful violation of the Act of Congress regulating interstate commerce by fraudulently obtaining transportation of said mules at an illegal rate through the suppression of information as to the true value thereof, and that the law will not lend its aid to enforce a demand having its origin in the breach of the law itself.

PRITCHARD, ALLISON & LYNCH,
Attorneys for Defendant.

Motion to File Additional Pleas.

Filed January 20, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY CO.

In this cause comes defendant Cincinnati, New Orleans & Texas Pacific Railway Company, by its attorneys, Pritchard, Allison & Lynch, and moves the Court for permission to file two additional pleas to plaintiff's Declaration.

PRITCHARD, ALLISON & LYNCH,
Attorneys for Defendant.

Special Pleas.

Filed January 20, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY CO.

In this cause comes the defendant Cincinnati, New Orleans & Texas Pacific Railway Company by its attorneys, and by leave of court first had and obtained, files additional special pleas to plaintiff's declaration as follows:

VIII.

For further plea to so much and such parts of the plaintiff's
15 declaration which alleges "that the defendant sold all of said mules which had not been killed, and appropriated and converted the proceeds of sale and still retains and has never accounted for the same," this defendant says that it did sell said animals at public outcry to the highest and best bidder for cash, and received therefor the sum of $867.66 after deducting the necessary expenses of said sale and keep of said mules until the sale could be propertly advertised, which amount defendant tendered to the plaintiff and here and now tenders into court in full settlement of plaintiff's demand. Defendant was forced to sell said mules for the following reasons:

The car in which said mules were being shipped was derailed at Dayton, Tennessee, without any fault on the part of the defendant. (Some of said mules were killed, for which defendant admits liability to the extent of the agreed valuation fixed in the contract filed as Exhibit No. 1 to plaintiff's declaration, namely $75.00 per head). Other mules were injured, and where the injury amounts to so much defendant admits liability to the extent of the agreed valuation fixed in said contract, namely $75.00 each. A part of said mules were, if injured at all, so slightly injured as not to effect their value and for which plaintiff sustained no damage. Immediately after said derailment defendant procured the services of a veterinary surgeon at Dayton, Tennessee, and had the injured mules properly treated and all of them properly cared for. Plaintiffs *were* promptly notified by defendant of the accident and said mules were tendered to the plaintiffs and the plaintiffs urged to receive them without prejudice to any claim *they* migth have against the defendant for all the mules that had been killed and for all the mules that had been injured. Whereupon the plaintiffs declined to receive any of said mules, either the ones which were injured or those not injured. Whereupon de-
fendant requested the plaintiffs for instructions as to what
16 disposition to make of said stock, which plaintiffs declined to give. Defendant thereupon, after duly advertising said sale, sold said mules for plaintiffs to the best advantage to the highest bidder for cash, realizing therefor, after deducting the cost of said

sale and of keeping said mules to the date of said sale, the sum of $867.66.

Defendant therefore denies that it converted any of said mules to its own use and denies liability in any amount for damage to any of said mules that were not injured, and denies liability for the ones that were killed or injured in excess of the limited valuation stipulated in the contract of shipment.

IX.

For further plea defendant says that it is a common carrier engaged in interstate commerce within the provisions of the act of Congress of February 4, 1887, as amended by the Act of June 29, 1906; that in obedience to said act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Danville, Ky., to Atlanta, Ga., which schedules, approved by said Interstate Commerce Commission, showed that the rates and charges on a carload of mules and horses from Danville, Ky. to Atlanta, Ga., when the value of said horses and mules did not exceed $75.00 each, was $95.00 per car, and further provided that for every increase of one hundred per cent or fraction thereof in said value there should be an increase of fifty per cent in the freight rate. Plaintiffs, prior to and at the time said shipment was made from Danville, Ky., to Atlanta, Ga., knew that the freight rate was based upon the value of the horses and mules so shipped and that the defendant stood ready to ship said stock at an increased valuation at an increased freight rate, and knowing this fact the plaintiffs declared the valuation of said horses and mules to be $75.00 per
17 head and thereby obtained the cheaper freight rate of $95.00 per car. The receipt or bill of lading issued to plaintiffs by defendant placed a value upon the horses and mules for $75.00 each and was signed by the shipper. In addition to reciting the provisions for increase in freight rate for each increase of one hundred per cent or fraction thereof in the valuation, the bill of lading further provides "that the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals unless an additional amount is herein stated and paid for," which contract, with all the provisions thereof, is valid and binding upon the plaintiffs and the defendant when applied to interstate shipments which are governed by the Acts of Congress of February 4, 1887, and June 29, 1906, and defendant pleads and relies upon the same as a complete bar to any recovery (in excess of $75.00 for such mules) as were actually killed and such ones as were actually damaged to the amount of $75.00.

PRITCHARD, ALLISON & LYNCH,
Attorneys for Defendant.

18 *Agreed Order.*

Entered January 29, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY Co.

By consent of parties*k* it is ordered in this case that the pleadings be made and the cause then stand for trial on Monday February 24, 1913 as the first case on the assignment for that day

Motion to Amend Declaration.

Filed January 31, 1913.

D. F. RANKIN,
vs.
C., N. O. & T. P. RY. Co.

In this cause*m* plaintiffs move to amend the second count of the declaration so as to allege that the mules and horses in question which were killed and injured were being transported on one of defendant's trains in or near the town of Dayton, Tennessee, when a wreck or collission occurred, thus causing the injuries complained of to said shipment, and that there was at the time a City Ordinance of the Town of Dayton, a municipality in the State of Tennessee, regulating the speed of railway trains therein, and that defendant's train was being run in violation of said City Ordinance.

W. B. MILLER,
Attorney for Plaintiffs.

19 *Declaration Amended.*

Entered February 19, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. Co.

"In this cause, on motion of plaintiffs, they are allowed to so amend both counts of their declaration as to aver therein that the mules, the value of which is sued for, were killed, injured and damaged while in defendant's custody under the contract sued on and while defendant, as a common carrier, was transporting said mules through the Town of Dayton, a municipal corporation in Tennessee; that the train whereon said mules were being transported, was wrecked in said Town of Dayton while being operated in violation of municipal ordinances of said Town regulating the rate of

speed at which such trains should be operated, in that the train was being operated at a greater rate of speed than permitted by said ordinances, when the wreck occurred, and that such wreck was caused or directly contributed to by defendant's failure to comply with said City Ordinance which was then in full force. And hence defendant is liable for the value of said mules as contended in the original complaint.

To the declaration as thus amended, the defendant is allowed to rely on its seven original pleas and its 8th and 9th additional pleas recently filed. And on each and all said pleas the plaintiffs have this day joined issue, and by consent, this suit will stand for trial Febry. 25, 1913."

20 *Issued Joined on Pleas.*

Filed February 19, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

The plaintiffs join issue on the nine pleas of defendant heretofore filed herein.

W. B. MILLER,
Attorney for Plaintiffs.

Jury Respital.

Entered February 28, January Term, 1913.

D. F. RANKIN,
vs.
C., N. O. & T. P. RY. CO.

Came the parties by attorneys, and also a jury of good and lawful men, to-wit: J. F. Faulkner, M. C. Gill, W. E. Harper, Thos. Holt, Frank Hixon, W. C. Lowery, F. E. Melburn, A. M. Meadows, W. J. Norris, W. B. Poe, O. M. Phillips, Abe Slabosky, all duly empannelled and sworn according to law, who having heard portions of the proof when adjourning hour having arrived, were respited until tomorrow morning at 9 o'clock.

Final Judgment.

Entered March 1, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

Again came the parties by attorneys, and again came the same jury of good and lawful men, to-wit: J. F. Faulkner, M. C. Gill,

W. E. Harper, Thos. Holt, Frank Hixon, W. C. Lowery, F. E. Melburn, A. M. Meadows, W. J. Norris, W. B. Poe, O. M. Phillips, Abe Slabosky who were heretofore duly empannelled and sworn according to law, who were respoted on last night, having returned into open Court, and now having heard all the evidence and
21 the argument of counsel and the charge of the Court, do say upon their oaths aforesaid, that rhey find the issues in favor of plaintiff and fixed the amount of recovery in the sum of $4180.00 and $328.82 interest.

It is therefore ordered and adjudged by the Court that the plaintiff recover of the defendant the sum of $4508.82 and all the costs of the cause for which execution may issue.

Additional Time for Filing Motion New Trial.

Entered March 4, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

In this case, on motion of defendants, the Court grants 10 days additional time to prepare and file a motion for a new trial.

Motion New Trial Made.

Entered March 12, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

Came the defendant and moved the Court to grant it a new trial for the reasons set out and assigned in written motion this day filed with the Clerk.

Motion Overruled and Appealed.

Entered March 21, January Term, 1913.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. CO.

This day this cause came on to be heard upon the motion of the Cincinnati, New Orleans & Texas Pacific Ry. Company for new trial, which motion is in words and figures following, to-wit:
22 "Comes the defendant and moves the Court to set aside the verdict of the jury and grant a new trial in this case for the following reasons:

1. Because the verdict was excessive in this that the value of the mules shipped had been fixed by agreement between the plaintiff and the defendant at the time they were received by the defendant for shipment, at $75.00 for each mule as set out in the bill of lading exhibited with the declaration in this case; and this at most was all plaintiff was entitled to recover, if anything.

2. The Court was in error in holding that the burden of proof was upon the defendant Railway Company to show affirmatively that it had complied with the provisions of the Interstate Commerce Act requiring the filing of its rates with the Interstate Commerce Commission.

3. The Court was in error in charging the jury as follows:

"It follows therefore that under the facts in this case the undisputed facts and the decisions of our courts on this subject, that the Court is of the opinion that the contract in this case is invalid and the question goes to the jury as to the neglogence of the defendant on this shipment of stock."

4. The Court was in error in permitting the plaintiff to testify, over the objection of counsel for defendant, that he did not read the bill of lading and did not know its terms at the time he signed same.

5. The Court was in error in declining the permit the witness M. L. Hartman to testify that he was running his train at the time of the acident at the customary rate of spped in towns the size of Dayton.

23 6. The Court erred in declining to permit the same witness Hartman to testify that the engineers of the defendant Company habitually ran their trains at the rate of spped at which he was running the train on the day of the accident through Dayton and other towns of like size.

7. The Court erred in declining to permit the witness Hartman to testify in effect, from his experience, that he was not running the train at a dangerous rate of spped at the time of the accident.

8. The Court erred in charging the jury as follows:

"If you find from the proof in this case that the plaintiff did deliver in good condition 19 mules to the defendant to be transported to Atlanta, Ga?k and that there was an accident, a collision on the rai-orad, then the burden is upon the railway company to show that it has not been guilty of anh negligence.

If the Railway Company fails to show its freedom from negligence, then the plaintiff is entitled to recover for the value or the stock delivered."

9. The Court erred in permitting the proof of the Dayton ordinance to go to the jury because there was no proof to show that said ordinance had been legally and properly adopted.

10. The Court erred in permitting the proof of the rules of the Company, with reference to the rate of speed at which trains should run through the town of Dayton to be introduced because neither the existence nor bread-h of such rules is alleged in the declaration; and further, because it was shown and admitted that these ruoes were adopted for the protection of persons and animals in the town of

Dayton and not for the protection of freight or passengers being carried by the defendant's trains.

11. The Court erred in charging the jury as follows:

"Negligence is the want or lack of exercise of that degree of
24 care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals. Take the case."

12. The Court was in error in charging the jury that plaintiff was entitled to recover the value of the mules at the place of their destination.

13. Plaintiff was not entitled to recover anything in this case because he did not show that he had either paid or offered to pay the legal freight rate for the shipment of said mules from Danville, Kentucky, to Atlanta, Georgia.

14. Plaintiff is not entitled to recover anything in this case because the evidence affirmatively shows that the mules were injured through no negligence on the part of the defendant Company, but from an unavoidable accident.

15. The verdict should be set aside because there is not evidence to support it.

Wherefore the defendant prays that the verdict of the jury be set aside and a new trial granted.

In case the Court should decline to do this, then the defendant moves the Court to render judgment for the value of the mules, the injury to which is sued for in this case, at the rate of $75.00 each as per the contract between the parties notwithstanding the verdict of the jury.

PRITCHARD, ALLISON & LYNCH,
Attorneys for Defendant.

Which motion, being considered by the Court, is hereby overruled; to which action of the Court in overruling said motion said defendant, Cincinnati, New Orleans & Texas Pacific Railway Company excepted and prayed an appeal to the next term of the
Court of Civil Appeals at Knoxville, which is granted upon
25 said defendant giving proper appeal bond as required by law, which is done, and said appeal is therefore granted by the Court. It is further ordered that said defendant be given thirty days from the adjournment of this term of court in which to prepare and file a bill of exceptions, and when prepared and signed by the Court the same shall be made a part of the record.

Appeal Bond.

Filed March 17, 1913.

In the Circuit Court of Hamilton County, Tennessee.

D. F. RANKIN
vs.
C., N. O. & T. P. RY. Co.

Know all men by these presents, That we, Cincinnati, New Orleans & Texas Pacific Railway Company, as principal, and M. M. Allison and J. J. Lynch as surety, are held and firmly bound unto D. F. Ranking and T. C. Rankin in the sum of Five Hundred ($500.00) dollars.

To be void on condition that the said Cincinnati, New Orleans & Texas Pacific Railway Comoany shall successfully prosecute an appeal prayed by it to the next term of the Court of Civil Appeals to be held at Knoxville, Tennessee, from a judgment *f* for the sum of $4508.82 rendered against said defendant C. N. O. & T. P. Ry. Company and in favor of said D. F. Rankin for the use of T. C. Rankin on the 1st day of March, 1913, by the said Circuit Court of Hamilton County, Tennessee, or shall pay all costs and damages that may be adjudged against said defendant C. N. O. & T. P. Railway Company by reason of said appeal. Otherwise to be and remain in full force and effect.

26 Witness our hands and seal this 17th day of March 1913.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.,
By J. J. LYNCH, *Attorney.*
M. M. ALLISON, *Surety.*
J. J. LYNCH, *Surety.*

27 *Bill of Exceptions.*

Filed April 12, 1913.

T. C. and D. F. RANKIN
vs.
C., N. O. & T. P. RY. Co.

CHATTANOOGA, TENNESSEE, February 28, 1913.

On the trial of this case the following testimony was introduced:

Mr. LYNCH: We just want to write in the 7th plea that no other rate was ever paid or tendered by the plaintiff; treat that as having been written in the plea.

COURT: You may do that.

Mr. LYNCH: We want to ask permission of your Honor to strike from the plea that the defendant admits any liability at all (strike that from the 8th plea).

Mr. MILLER: We submit that after the case has gone to the jury on the pleadings, on a plea that admits liability for several hundred dollars that they cannot then strike that out of the pleadings. I will say, however, very frankly that that does not change the attitude of the case at all.

COURT: Certainly, strike the plea.

Exception for the plaintiff.

The following words were stricken from the plea, "several mules were killed for which the defendant admits liability to the extent and according to the obligation fixed in the contract filed as Ex. #1 to the plaintiff's declaration, namely $75.00 per head." Wherever it admits liability to the extent of $75.00 per head that is stricken from the pleadings.

Mr. MILLER: Now we have one witness from Dayton and possibly two which we desire to introduce at this time, in regard
28 to the City ordinances of Dayton, and I would like to put them on now.

COURT: All right, sir.

J. L. HENRY, sworn for the Plaintiff.

Direct examination.

Questions by Mr. MILLER:

Q. What official position do you hold in the town of Dayton?

A. I am the Recorder, the City Recorder.

Q. You have the custody of the books and minutes and proceedings that are had by the Mayor and Aldermen under the charter?

A. Yes sir.

Mr. MILLER: I have at this stage an Act of the Legislature creating the municipality which I think you gentlemen will treat as read.

Mr. LYNCH: Treat it as read.

Introduced in evidence, Clerk will *occupy*, as follows:

29 Q. (Handing book to witness.) I will ask you to state what this is now that I present to you?

A. That is the book of City Ordinance-.

Q. The City Ordinances in printed form as they were enacted?

A. Yes sir.

Q. Now, that compilation purports to be signed by W. L. Givens, J. L. Gosdey and J. L. Daniel as printed: I will get you to refer to your minute book or the minute book kept*n* by your predecessor if you have it precent, and read that portion of the minutes which prov*u*des for the codification of these ordinances and their subsequent adoption section by section as they were afterwards printed and distributed—turn first to page 549?

A. Yes sir.

Q. Now, just read that portion which refers to the codification of the ordinances?

A. "Motion made and seconded that the Mayor appoint a com-

mittee of three to have the city ordinances codified and published," Col. W. L. Givens, J. L. Godsey and J. L. Daniels was appointed such committee.

Q. That was under what date?

A. July 5, 1905.

Q. Now, file as——

Mr. LYNCH: We want to raise the objection to that because that is not the proper way to prove them.

Objection overruled. Exception for the defendant.

Q. Now, if that committee subsequently made a report, read what your minutes show on that subject.

A. "The committee appointed to revise and codify the ordinances reported as to the revision and submitted the following copy of the code of the ordinances which after consideration was adopted and passed."

30 Mr. LYNCH: We except to the statement that it was adopted and passed. If he has got any record that shows that let him produce it.

Mr. MILLER: He is reading from the minutes.

Objection overruled. Exception for the defendant.

COURT: I take it that is the record.

Mr. MILLER: He is reading from the record.

A. "All present voting for its passage" R. M. Sherman, J. C. Morgan C. H. Smith, J. C. Dod and J. L. Daniel."

Q. I will ask you when you were elected City Recorder?

A. Why the present term I was elected last May.

Q. Have you served before?

A. Yes, two terms.

Q. I will ask you whether or not the minute book from which you read is the minute book of the meetings of the Board of Mayor & Aldermen of the City of Dayton?

A. Yes, that is *the* one of the minute books.

Q. It is in your custody as the present Recorder?

A. Yes sir.

Q. And does that show that all present voted for the passage of these ordinances?

A. Yes sir.

Q. What was the date of the meeting?

A. Adjourned session of July 12, 1905.

Q. Now, is the compilation which I show you purporting to be a compilation of the City Ordinances of the City of Dayton the ordinances as subsequently printed and has it been distributed as such since that time?

Mr. LYNCH: We insist that that is not the way to prove them.

31 Objection overruled. Exception for the defendant.

Q. State whether or not that is the compilation of the City ordinances of Dayton?

A. Yes sir, that is the one that we use.
Q. And has it been in use during your term as City Recorder?
A. Yes sir, it has.

Ordinances thus offered are as follows:
"SECTION 39. To run, or cause to be run in the City any railroad engine, train or car, faster than at the rate of ten miles per hour; or to run same over any street or crossing within the city without continuously ringing the alarm bell during the progress over and between said crossings."

32 Q. Now, are you acquainted with the territory in the *two* of Dayton which embraces that portion of the City limits occupied by the Cincinnati Southern Railroad, or as it is technically known, the Cincinnati, New Orleans & Texas Pacific Railway Company, extending southward from 4th avenue down to 2nd avenue and on southward from that to the depot in North Dayton?
A. Yes sir.
Q. How long have you been acquainted with that territory?
A. Well, I was acquainted with it before that railroad was ever built; I was raised in Rhea County.
Q. I will ask you to state what the character of the country in through which the Cincinnati Southern R-ilroad extends from 4th Avenue going northward towards the town of Evansville in Rhea County?
A. Well, it is in a valley; of course there is some low places and some high places and then there is a right smart little cut just above Dayton.
Q. Well is *it* not the railroad track level extending from 4th Avenu- north or practically so?
A. Yes sir.
Q. State how far you can see along the track, the Cincinnati Southern Railroad track if you are at 4th Ave*b*ue looking northward?

Objected to. Objection overruled. Exception for the defendant.

A. Well, you can see quite a distance; the railroad is straight I think from 4th avenue almost as far as you can see; if I am not mistaken.
Q. The track is practically straight from 4th avenue northward?
A. Yes sir.

Q. What is the condition of the track, I mean whether
33 or not it is straight, coming from 4th Avenue, southward to 2nd avenue to the Cincinnati Southern depot in North Dayton?
A. Well, it is straight for some little distance south of 4th Avenue, then there is a curve.
Q. A curve?
A. Yes sir.

Cross-examination.

Questions by Mr. ALLISON:

Q. This book from which you have read purports to be, as you say, a minute book showing the transactions of the Board of Mayor & Aldermen of the Town of Dayton, Tennessee?

A. Yes sir.

Q. That book was not copied by you?

A. No sir.

Q. Now, the only part of that record that you have read simply shows that a committee was appointed to revise and codify the ordinances, and that they reported as to the revision of the ordinances and submitted the following copy of the code of the ordinances which after consideration was adopted and passed; Now, does this record show anywherre whether or not these ordinances or that codification was ever read?

A. Well, I don't know anything about that only just what I have read; I know this is the book of ordinances and that it is signed by Mr. Given and Mr. Daniel.

Q. You are speaking of this book, are you?

A. I am speaking of this minute book; this corresponds with the committee that was appointed at this time.

Q. I will come to that; I am now asking about this minute book, if this minute book shows that they signed the ordinances

34 as they were revised and approved?

A. I don't know anything about that; all I know is just what this shows.

Q. Well, I am asking what this shows?

A. It shows that the committee that was appointed reported.

Q. Does it show what their report was?

A. No sir, it just shows what I have read.

Q. But it fails to show what the report was that was adopted does it not?

A. Yes sir.

Q. And the other little printed book which you have in your hand, which purports to be a codification of the ordinances of Dayton, do you know of your own knowledge whether that contains the report that is referred *in* in this minute book?

A. No sir, I do not.

Q. Is that codification dated or signed by anybody?

A. It is signed by Mr. Givens——

Mr. LYNCH: You mean that their names are printed, no signatures to it?

A. Yes sir.

Mr. MILLER: I said that we would introduce a member of the committee who particupated in the meetings and who actually supervised the printing.

Redirect examination.

Questions by Mr. MILLER:

Q. I will ask you to state whether or not the record from which you have just read is in the handwriting of Mr. T. P. Foust, who was then City Recorder—state if you know his handwriting?

35 A. Yes sir.

Q. State whether or not it is signed by Mr. R. M. Sherman, the Mayor?

A. Yes, Sherman and Foust.

Q. Mr. Sherman is dead now I believe?

A. Yes sir.

M. MILLER: Now, I offer formally in evidence Chapter 229 of the Act of Tennessee of 1903, incorporating the town of Dayton and fixing the corporation limits and I would like to treat that as read; also Chapter 122 which repealed the old corporation of the town of Dayton, at the same session.

COURT: Treat those Acts as read.

D. F. RANKIN, sworn for the Plaintiff.

Direct examination.

Questions by Mr. FOX:

Q. Tell the jury your name.

A. D. F. Rankin.

Q. Where do you live?

A. I live near Danville, Kentucky.

Q. How long have you lived there?

A. I have lived there for three years; I have lived near Danville for ten years.

Q. What is your business?

A. Farmer and stock raiser.

Q. Any other business besided handling stock?

A. Yes, I ship mules to the State of Georgia abd sell them.

Q. Buy and sell mules?

36 A. Yes sir.

Q. Now if you shipped a car load of mules in November, state where you shipped them from?

A. Yes, I shipped a car load of mules; fed them at my barn and then shipped them from Danville, Ky.

Q. When were the mules shipped from Danville?

A. They were shipped on the 6th day of November.

Q. On what year?

A. 1911.

Q. What time in the day did you carry the mules to the depot at Danville to be shipped?

A. Well, I got them to the depot something like four or five o'clock may be 4:30 in the afternoon.

Q. How many mules were there in that carload that you shipped?

A. Twenty-seven mules & two horses.

Q. How many of the 28 mules in the car load belonged to you and Thomas F. Rankin, the plaintiff in this suit?
A. 19.
Q. The others did not belong to you?
A. No sir.
Q. Did you see these mules loaded in the car?
A. Yes, I loaded them myself.
Q. In what condition were they when they were put upon the cars?
A. They was in good condition, fine condition; these mules had been fed in my barn since the first of September and they were in fine shape.
Q. How long had you been handling these mules before you shipped them?
A. Well, these mules had been bought from the 20th of August to the 20th of September and they had been in my barn and had been fed for about a couple of months.
37 Q. Where did you buy them?
A. I bought them at various places; I bought some at Danville and got some at Somerset and some at Richland and some at other places in Kentucky.
Q. Where had they been handled in the barn of which you speak?
A. They had been in my barn near Danville.
Q. How many mules did you have there that you were feeding?
A. I had 70 mules.
Q. And how many of the 70 did you ship?
A. 19 out of the 70.
Q. Tell the jury whether or not the 19 that you shipped in this load were inferior to the others or how they compared with the other mules?
A. The 19 mules that I shipped were the best mules out of the 70 that I had in the barn.

Mr. LYNCH: We object to that.

Q. State whether or not in shipping these 19 mules you made a selection out of the bunch you had?
A. Yes sir.
Q. You have had a good deal of experience in handling mules have you not?
A. Yes, I have been handling mules for something like 15 years.
Q. What experience have you had in shipping mules?
A. I have been shipping mules south for more than ten years.
Q. Where do you usually ship to, Georgia?
A. Yes, sir; I have sold about a hundred head of mules from Atlanta and then I have sold and shipped down there to other places; I have been at it for about ten years.
Q. State what, in your judgment, those 19 mules were worth at the time they were delivered to the railroad.

38 Mr. LYNCH: We want to object to the value of the mules because the value is set out in the contract between the parties.

Objection overruled. Exception for the defendants.

Q. Just state what they were worth when they were delivered to the railroad at Danville?

A. Those 19 mules were worth $225.00 a head.

Q. What in your judgment and from your experience in trading and shipping to Atlanta and to Georgia, what would those mules have been worth in Georgia?

Mr. LYNCH: The contract shows that the value of the mules is to be taken at the place of shipment, which would be at Danville.

Objection overruled. Exception for defendant.

Q. What would they have been worth?

A. In Georgia?

Q. Yes, sir?

A. I was in Georgia about three weeks before this and a customer that I had there when I told him what I had, and he showed me what he had a/sd he said that he had sold five pair of those mules for $500.00 a pair.

Objected to.

COURT: Do not state what the customer said.

A. Well, those 19 mules were worth from $230.00 to $240.00, we will say from $235.00 to $245.00 a head.

Q. A head?

A. Yes, sir.

Q. What would be the cost of transporting the mules from Danville, what would have usually been the cost?

A. About $135.00.

Q. For the car load?

A. Yes, sir, from Danville to Odessadale, Georgia, where they were to be shipped.

39 Q. How many mules do you handle to a car load, about?

A. From 25 to 30.

Q. What would be the freight charges per head?

A. About $4.50.

Q. Did Thomas F. Rankin or anybody representing you go with these mules?

A. My father went with this load of mules.

Q. I mean did he go in the car with the mules?

A. No, sir, nobody went with the mules.

Q. They were left solely to the charge of the railroad?

A. Yes, sir.

Q. What time of day did they leave Danville?

A. They were supposed to leave at 10 o'clock at night.

Q. When did you last see those mules?

A. I saw the stuff something like 8:30 or 9 o'clock, I got to the station somewhere about that time, that was when I last seen them soon after I got to the station.

Q. Did you go to the depot immediately and make arrangements with the railroad authorities for the shipment of this car load of mules?

A. Well, I made that something like five o'clock in the evening.

Q. Just tell what occurred at the time, what was said to them and what they said to you about it, if anything?

A. I went to the depot office—I had ordered the car the day before and I asked the agent about the car for the load of mules; the mules was in pen and I told the agent that I was ready——

Mr. Lynch: Your Honor understands that we are objecting to any conversation that occurred between him and the agent of the company, because there is a written contract which is set out in the declaration and any oral statement or conversation between the parties prior to that or at the time of the execution of
40 the contract would be merged in it and that cannot be introduced:

Objection overruled. Exception for the defendant.

Q. State what you said to the agent in regard to the shipment of the stock?

A. I went in the office and told him that I was ready to ship the stock and he filled out his blank and signed it and I told him that I was ready to ship the mules and that I was anxious to get them away and get them in Atlanta; I signed the paper and left it there and told him that my father would come in and get it as he was going with the load of mules; I told him that I would leave it there at the office and that he would come in and get it and to give it to him the next morning. That was all that was said about it.

Q. Did you sign the paper that he submitted to you then?

A. Yes, sir.

Q. Was anything said by the agent to you in regard to the value of the mules?

A. No, sir.

Q. Or any other rate on the mules?

A. No, sir.

Q. Was anything said to you about the value of the mules or the rate on them?

A. No, sir, he never asked me anything about it.

Q. Was the rate discussed in any way?

A. No, sir.

Q. He signed the paper and handed it to you?

A. Yes, sir.

Q. And you left it with him?

A. Yes, sir.

Q. Do you know what became of that paper afterwards?

41 A. Well, he said that he give it to my father the next morning. I don't know; I left it at the office and I did not go back any more.

Q. I want you to state exactly to the jury the condition of those 19 mules at the time you delivered them to the railroad company?

A. Well those 19 mules were in good condition, in good flesh, good hair and were in fine condition; they were 15 or 16 hands high and weighed from 950 to 1100 pounds.

Q. What were their ages?

A. From four to six years old?
Q. How were they as to work?
A. They were all broke mules, every one of them were broke.
Q. Did you ever see any of those mules after you delivered them to the railroad?
A. I seen three of those mules on the 19th day of December, 1911 in Atlanta, Ga.
Q. On the 19th of the following December after they were delivered to the railroad?
A. Yes, sir.
Q. Where did you see them?
A. They were at the Patterson Commission Company.
Q. What was being done with them there?
A. They were in a stall.
Q. Who put them in the stalls?
A. The railroad company I suppose.
Q. Were any of them sold there that day?
A. They were selling them that day.
Q. Before they were sold were they offered to you by the railroad Company?
A. Yes, they were.
42 Q. Did you receive them or not?
A. No, sir, I did not.
Q. Tell the jury why you did not?
A. Well, they were in such a condition that I could not handle them. They were not in shape so that I could do anything with them.
Q. In what condition were they?
A. Well they were covered with bruises and there was one of the mules that some of his ribs had been broken loose and they were bruised considerably about the hocks; they were in such shape that I refused to take them on account of their condition.
Q. After that were they then sold to the Railroad?
A. Yes, sir.
Q. How did they sell them, at public auction?
A. They were sold by the Patterson Commission Company. While they were being sold there was a gentlemen come up and made a statement——

Objected to. Objection sustained.

Q. Were they sold at public auction?
A. Yes, sir.
Q. At the time they were sold at public auction were they represented to be sound and all right?
A. No, sir, they were sold as——

Objected to. Objection sustained.

Q. What did they bring at public auction?
A. Well, sir, there was one of the mules brought $112.50, one of them $117.50 and $122.50.
Q. Were they a part of the 19 that you shipped?
A. Yes, sir.

Q. Had you ever seen the mules from the time that you shipped them until that day, any of them?

A. No, sir.

43 Q. What became of the balance of the 16 mules?

A. I could not say.

Q. You don't know personally what became of them?

A. No, sir.

Q. What railroad was this?

A. The Q. & C.

Q. Well, that is known as the Cincinnati, New Orleans & Texas Pacific?

A. Yes, sir.

Q. They were the ones with whom you made the arrangement and delivered the mules to at Danville?

A. Yes, sir.

Q. The fefendant in this case?

A. Yes, sir.

Q. That railroad runs from Danville to Chattanooga?

A. Yes, sir, from Cincinnati, Ohio, to Chattanooga.

Q. Runs from Danville to Chattanooga?

A. Yes, sir.

Q. Comes through the town of Dayton?

A. Yes, sir.

Q. Do you know anything about the published rates for live stock from Danville to Atlanta?

A. They claim to have then there.

Q. Did you ever see those rates posted up at Danville?

A. No, sir.

Objected to.

Mr. LYNCH: He would be charged with knowing it under the law.

COURT: I sustain the objection.

Exception for the plaintiff.

44 A. You mean to ask me if I ever seen them posted there?

Q. I mean if you ever saw them posted, did you ever see any rates posted there at the depot, about the depot at Danville?

A. No, sir.

Q. On stock from Danville to Atlanta?

A. No, sir.

Q. Did you ever see them posted there about the depot?

A. No, sir.

Q. Do you know what the rates were?

Objected to.

A. I have shipped stock there and I have paid $95.00 a car.

Q. Was there anything said to you at the time of the shipment of this stock that greater rates prevailed and about their being increased 100 per cent?

A. No, sir.

Q. Or a fraction thereof?

A. No, sir.

Q. Or for every increase of 100 per cent in the value that the freight rate *k*ncreased fifty percent?

A. No sir.

Q. Was anything said on the subject?

A. There was not anything said about the value of the stuff whatever.

Q. Was anything said by the agent at the time you shipped this stock or at the time you signed this paper either about the freight rate or the valuation?

A. No, sir.

Q. Did you ever see the *rpinted* tariff rate applying to shipments of stock from Danville to Atlanta, Ga. published, at or near the depot at Danville?

A. No, sir.

45 Q. Did you ever know of one at all?

A. No, sir.

Q. Never heard of such a rate?

A. No, sir.

Objected to.

Q. The paper you state you signed at the time you shipped the stock did you read it?

A. No, sir.

Q. Was it read to you?

A. No, sir.

Mr. LYNCH: After he has signed a document he is estopped from disputing the contents of it.

Objection overruled. Exception for the defendant.

Mr. MILLER: I suppose you concede that that is an exact copy of the shipping contract that is attached to the declaration?

Mr. LYNCH: Yes, we concede that is a copy.

Cross-examination.

Questions by Mr. LYNCH:

Q. Who is your father?

A. Robert Rankin.

Q. You had been shipping stock for a long time, had you not?

A. Yes, sir, I had been shipping some.

Q. For how many years?

A. I have been shipping from that point for 7 or 8 years.

Q. For some time you had been paying a rate of $95.00 a car?

A. Yes, sir.

Q. From Danville?

46 A. Yes, sir.

Q. You never had asked for any rates?

A. No, sir.

Q. Never had asked for any reduction?

A. No, sir.

Q. You never made any search for any and never looked for any?

A. No, sir.

Q. That was the bill of lading that was given you and that you say you signed at that time?

A. Yes, sir.

Q. Now then, how many of these mules did you ever see after they were shipped?

A. I never seen but three of the mules.

Q. Of these mules that were delivered?

A. Yes out of the 19.

Q. Did you see some of the mules here in Chattanooga?

A. No, sir.

Q. Did you have any conversation with Mr. Short about it?

A. I don't know Mr. Short.

Q. In Atlanta?

A. Well, there was some man that I saw in Atlanta, I think it was in Atlanta; there was some fellow down there that I talked to but I don't know whether it was Mr. Short or who it was.

Q. He asked you to take these mules back without any prejudice of your rights as to any claim you had against the Railroad Company?

A. Yes, sir.

Q. That was at some agency down there?

A. Yes, sir.

Q. He made you that offer there?

A. Yes, sir.

47 Q. And you declined at that place to take back the stock?

A. Yes, sir; wait a minute; I offered to take back a part of the stuff but I told him if he wanted me to take back the whole business I could not do it; I offered to take back a couple of the mules and he said if I did not take back everything I could not take back any thing; there was a couple of the mules that I offered to take back that I thought I could sell but he said if I did not take them all I could not take any of them and I told him we would let them go to a sale.

Q. He wanted you to take them back without any prejudice to your rights?

A. Yes, sir.

Q. And you said that you only wanted to take back some of the

A. Why, sure I could not do anything with them in the condition they was in.

Q. I will ask you if you did not get instructions from your attorney before declining?

A. I don't remember that I did—no, sir, I am satisfied that I did not.

Q. Did you not get a telegram from your attorney?

A. Yes, I got a telegram; I first got a telegram from my attorney on the day of the sale and then I got a telegram from my attorney not to receive them.

Q. You notified Mr. Short that you had a telegram from your attorney not to receive them?

A. Yes, sir.

Q. Not to receive any of them?

A. Yes I got a telegram not to receive them.
Q. You offered to take part of the stock back and after you got the telegram then you refused to receive them?
48 A. Yes, sir.
Q. Coming back to the time when you shipped the stock: You got in there in the evening with the mules?
A. Yes, sir.
Q. And put them in the stock *years?*
A. Yes, sir.
Q. And then loaded them into the cars?
A. Yes, sir.
Q. Before you loaded them in the cars you went up to the depot and got a bill of lading?
A. No, sir, I went to the depot and got a bill of lading after I had loaded them and left the bill there until the next morning for my father, he was to come there the next morning and get it.
Q. Mr. Coffman was the agent?
A. Yes, sir.
Q. He did not go down to the stock pens and examine the mules?
A. No, sir.
Q. He did not make out the bill of lading?
A. No, sir, he had a clerk there in his office and the clerk made out the bill of lading.
Q. A clerk in there that worked for M-. Coffman?
A. Yes, sir.
Q. Did this clerk go down to the pens and see the mules?
A. No, sir.
Q. So far as you know the agent did not see the mules?
A. No, sir, I suppose not.
Q. And the clerk did not see them either?
A. No, sir.
Q. That clerk is not down here?
A. No, sir.
Q. He is not in this county?
49 A. He is in Louisville I think with the Southern Railroad.
Q. Now, you have not paid the freight at all?
A. No, sir.
Q. You have not paid or tendered any freight?
A. No, sir.
Q. Or offered to pay it?
A. No, sir.

Redirect examination.

Questions by Mr. Fox:

Q. When you speak about the railroad agent at Atlanta offering you the stock——
A. I did not say anything about the railroad agent in Atlanta offering me the stock.
Q. Well, some railroad man.
A. There was some man there offered me the stock.

Q. Well, he is the railroad agent?
A. Well, I don't know about that.
Q. When he offered you the stock did he limit you to taking a whole or just a part?
A. No, sir, he told me if I did not take them all that I could not take anything.
Q. You had to take all or none?
A. Yes, sir.

Recross-examination.

Questions by Mr. LYNCH:

Q. You had a telegram from your attorney telling you not to take any at all, and you notified the railroad agent that you had a
50 telegram from your attorney not to take any of them?
A. Yes, sir.
Q. Now, then, you have been shipping stock for years and you always got a bill of lading with it?
A. Sure.
Q. You knew that was the custom to get a bill of lading and you always signed it?
A. Yes, sir.
Q. Always signed the bills of lading?
A. Yes, sir.
Q. In regard to paying the freight and signing the bills of lading; Did you know there was a $75.00 clause in there in regard to the valuation of those mules?
A. No, sir, I did not know there was a $75.00 clause in there.

Objected to. Objection overruled. Exception for the defendant.

ROBERT C. RANKIN, Sworn for the Plaintiff.

Direct examination.

Questions by Mr. FOX:

Q. What relation are you to Mr. D. F. Rankin, one of the parties to this suit?
A. I am his father.
Q. Where do you live?
A. I live in Doyle County, Danville, Ky.
Q. Were you the owner of any part of the mules that were
51 shipped on November 6, 1911, from Danville—any of the mules belong to you?
A. Yes, I had a part of the load.
Q. A part of the mules that were in this car?
A. Yes, sir.
Q. Were you present when these mules were loaded?
A. No, sir, I was not the day they was loaded.
Q. Did you know the mules that belonged to your son and your brother?
A. Yes, sir.

Q. How long had you known these mules?

A. Well, we had been feeding them—commenced in August and fed them on up until they was shipped; I saw them the day they were shipped, saw them in the mule pen.

Q. Did you see the 19 mules that belonged to the plaintiff in this case before they were shipped?

A. I did not see them that day but saw them the day before they was shipper; my re-lection is they was shipped on Saturday and I seen them on Friday.

Q. Describe those 19 mules.

A. Well, those 19 mules was sorted or taken out of a bunch of about 65 or 70 mules; my son had got an order for a certain class of mules and we was trying to fill that order.

Q. Were they any of these 19 mules?

A. Yes 10 of them.

Q. What experience have you had in handling mules?

A. Oh, I have been shipping and handling mules ever since I was big enough to do anything; I have been shipping for 30 years.

Q. What in your judgment were those mules worth on the 6th day of November, 1911, when they were delivered to the railroad in Danville, what were they worth in Danville?

A. They was worth $235.00; there was ten of those mules that would have sold for $250.00 a head.

52 Objected to. Objection overruled. Exception for defendant.

Q. What experience have you had in shipping and selling mules in the south, in Atlanta and south of Atlanta—were you or not at that time familiar with the price of mules in Georgia?

A. Yes, sir, I think I was.

Q. Well then, what in your judgment would those 19 mules have been worth in Atlanta or the place to which they were shipped?

A. They would have been worth from $230.00 to $235.00 per head.

Objected to.

COURT: Whenever this same matter is introduced you may just consider the same objection made and the same ruling and thus obviate making the objection each time.

Q. What would have been the cost per head of shipping the mules from Danville to Atlanta?

A. It would have cost about $3.00.

Q. Were you present when the contract was made for the shipment of these mules?

A. No, sir.

Q. Did you at any time see that contract?

A. Yes, sir; I went to the depot and got the contract Tuesday morning.

Q. What did you do with it?

A. After it was handed to me I put it in my pocket.

Q. Did you go south?

A. Yes, sir.

COPY BOUND T

Q. Where did you go?
A. I went to Atlanta.
Q. Were the mules in Atlanta when you got there?
A. They was not; I stayed there that day and the next day
53 and I heard there was a car load of mules wrecked at Dayton and I telegraphed back to learn about it and it was reported that the car of mules was from Danville.

Objected to.

Q. Just tell what you did?
A. I came back down here and I could not hear nothing; I went over to the office here and they did not seem to know anything and I finally telegraphed to Dayton to know something about it and they telegraphed me the number of the car that was wrecked and it corresponded with the contract I had. The agent down there wanted me to wait and see the agent from there who would come in that evening as he wanted to see me; so I waited and seen him and he wanted me to go back up there the next day and see the wreck; I told him I thought that was useless but he said if I would go he would go with me, he wanted to go and see the mules that was not killed so I went with him; that was Thursday morning. Thursday or rather Friday morning I went back up there——
Q. Up where?
A. To Dayton.
Q. Tell what you saw up there?
A. Well, I saw where the wreck had occurred and I seen the mules that was not killed; some of them could move about and one or two of them died while I was there, they said I did not see them.
Q. You say that you saw where the wreck had occurred?
A. Yes, sir.
Q. Where did it occur?
A. Right close to a mill there; the mill on the left as you come this way; they had put up a siding there and was passing around it until they could get the wreck cleared up; I think they got it cleared
up that night but I did not get away from there that night,
54 not until next morning.
Q. How many mules did you see when you got there, if you remember?
A. Well, I would not be positive but I think it was 11.
Q. What became of the others?
A. 11 or 12.
Q. What became of the others?
A. I think they brought those that were alive to this place.
Q. What became of the ones that you did not see?
A. Oh, they just took them out and buried them.
Q. Those that were killed?
A. Yes, the mules that were killed.
Q. Describe the mules that you saw after you got there?
A. Their condition?
Q. Yes, sir.
A. They was cut all to pieces; some with their sides all caved in

ID TO CLOSE IN CENTER

and hips and heads and legs all skinned up; they was all just skinned all over.

Q. Where were they at the time you saw them?

A. They was at an old barn there owned by a man I disreme-ber his name—W. B. Frater.

Q. How long did you remain there at that time?

A. At Dayton?

Q. Yes, sir?

A. I went there about 12 o'clock and got away from there the next morning.

Q. Did you ever see anything more of the mules after that?

A. No, sir.

Q. How many mules were in that car load that left Danville Nov. 6th, 1911, how many that belonged to Thomas C. and David F. Rankin?

A. 19.

55 Q. You had no interest in the 19?

A. No, sir.

Q. When you speak of going up to Dayton to see the wreck and the injured mules: That was Dayton, Tennessee?

A. Yes, sir.

Q. Do you know the streets in Dayton?

A. No, sir.

Q. Do you know where 4th Avenue is?

A. No, sir, I don't know where it is.

Q. You speak of a mill there where the wreck occurred: What mill was that?

A. I don't recollect the na*dm;* there is a *d*ide track there but I don't know the name of it.

Q. Where was the wreck in reference to that mill?

A. Well, it was right along close, by the side of it; the ground was all torn up there and they was putting in a new track, a side track, that run right along next to the mill; they had to put in a temporary track there to carry on the traffic.

Q. You don't know the location of the streets there?

A. No, sir.

Q. Do you know where the depot is in Dayton?

A. Yes, sir.

Q. How is the mill located in reference to the depot?

A. It was north or above the depot.

Q. About how far north?

A. It is some 200 yards I guess; it might not have been that far but it was only a short distance.

Q. Describe the wreck of which you speak, that you saw after you got there, describe the condition of it?

A. Well, the train was just piled up there and there was an engine or engines that were there all piled up together; there

56 was an engine and tender laying off to one side and the cars were all piled up there; the wreck had torn up the track and they was putting in a new track it looked to me like.

Q. What day of the week was it that you got there?

COPY BOUND TO

A. I think it was Thursday or Friday, I disremember now which day of the week it was I got up there.

Q. Was this wreckage and debris of which you speak east or west of that mill?

A. Well, it was right along by the side of the mill; it was just laying there by the side of the mill when I seen it and they were loading the stuff on the cars when I seen it there.

Q. Where was that temporary track of which you speak built?

A. Why, it was right along by the side of the mill.

Cross-examination.

Questions by Mr. LYNCH:

Q. You had a lawsuit at Danville for your loss?

A. Yes, sir.

Redirect examination.

Questions by Mr. FOX:

Q. You state that the contract or bill of lading was handed to you the next morning for the shipment of the stock?

A. Yes, sir.

Q. Did you read it?

A. No, sir.

Q. Do you know anything about its contents at all?

A. No, sir.

Mr. LYNCH: It don't make any difference what this man knew, he is not a party to the lawsuit.

57 COURT: I don't think any knowledge he had would be competent. I sustain the objection.

Q. The attorney for the railroad asks you if you had a lawsuit at Danville for the stock that belonged to you?

A. Yes, sir.

Q. What was the termination of that lawsuit?

Objected to. Objection sustained.

H. L. PENSE, sworn for the Plaintiff.

Direct examination.

Questions by Mr. FOX:

Q. Where do you live?

A. I live near Danville, Ky.

Q. How long have you lived there?

A. About 10 years.

Q. What is your business?

A. Farmer and stockman.

Q. What experience have you had in handling mules?

A. Why, I have handled mules ever since I have been in business.

TO CLOSE IN CENTER

Q. Did you see the mules that belonged to Thomas C. and David F. Rankin, that were shipped on the 6th of November, 1911?

A. Why, I saw the mules out in the fields and saw them over there while they were feeding them.

Q. Where did they feed them?

A. They fed them at a far- close to me, about a mile from me.

Q. Did you see any part of the mules that were shipped about the 6th of November, 1911?

A. I saw the mules the morning they were turned out for shipment, as they came out of the barn and were turned out in
58 the lot and started to town.

Q. Describe those mules that were turned out for shipment?

A. Well, they cut out 19 mules out of the bunch of about 70 head, took out the choice mules out of the lot and to the best of my knowledge there was 15 mules and four horse mules.

Q. What ages were they?

A. They run from four to six years.

Q. What, in your judgment, were those mules worth at that time?

Mr. LYNCH: It is understood that we are making the same objection.

Exception for the defendant.

A. The mules would have been worth around $225.00 a head.

Q. Had you had any experience about that time in buying or selling mules?

A. Yes, I had sold some mules to these Mr. Rankin and had shipped and sold some 10 or a dozen mules at about the same time.

Q. At public sale?

A. Yes, sir.

Q. What did they bring?

A. I sold four of them mules at $447.50 a pair and I sold a pair of mules about nine or ten years old for $357.50. The rest were young mules that had not been broken.

Q. Those mules that you speak of selling for $447.50, how did they compare——

Objected to.

Q. How did they compare with the Rankin mules, that 19 head of which you speak?

A. Why, they was smaller, they was not as tall; these mules were in as good a condition for sale as those that I told.

Q. Were the Rankin mules worth more or less?

59 A. They were worth more; his mules were worth $30.00 to $35.00 per head more.

No cross-examination.

DAVID RANKIN, sworn for the Plaintiff.

Direct examination.

Questions by Mr. Fox:

Q. Where do you live?
A. Garrard County, Ky.
Q. How long have you lived there?
A. Two years, going on three.
Q. What experience have you had in handling mules?
A. Well, I was raised on a farm and always handled mules.
Q. Did you know the value and price of mules in November 1911?
A. I had some mules that I owned and I had seen some mules and bought and sold some myself.
Q. Did you see the mules that belonged to Thomas C. and David Rankin that was shipped in November, 1911 from Danville, Ky., die you see those mules before they were shipped?
A. Yes, sir.
Q. How often had you seen them?
A. Well, once a week probably, sometimes twice a week; they lived there right close together.
Q. Did you see them the day they were shipped?
A. Well, I saw them after they were took down and put in the pens.
Q. Describe their condition to the jury?
A. They was a nice bunch of mules; they was something like 15 or 16 hands high and in good flesh, four to six years old.
Q. In your judgment what were those mules worth at the
60 time they were shipped, per head?

Objected to. Objection overruled. Exception for defendant.

A. Well, they were worth anywhere from $220.00 along there somewhere.
Q. Were you present when they were loaded on the cars?
A. No, sir, they was not loaded. I believe I heard the agent say, until somewhere between nine and ten o'clock; I saw them in the stalls there about sundown or dark and I went back home.
Q. I believe you stated that you came to town with them that day?
A. Yes, sir.
Q. In what condition were those 19 mules that day?
A. They was in good condition when they started for the railroad all right.
Q. Were you present when the bill of lading was handed to David F. Rankin?
A. Yes, sir.
Q. What, if anything, was said at the time the paper was handed to him about the rate or valuation?

Objected to. Objection overruled. Exception for the defendant.

Q. Was anything said by the railroad agent?
A. No, sir.

Q. Just describe what took place, what occurred, at the time the paper was handed out?

A. We was standing there and there was a kind of a clerk or something got the contract and the agent filled it out and handed it out to Mr. D. F. Rankin and he signed it and left it there.

Q. Did the agent then sign this paper?

A. Yes, sir.

Q. Nothing said by the agent of the railroad about the rate or valuation?

61 A. No, sir.

Objected to as leading.

Q. State what was *siad*, if anything?

A. He left the contract there and told him his father would be there in the morning and then he asked this man to try and fire them through this city without any feed bill, to Atlanta, Ga.

Q. Was anything else said?

A. No, sir, I don't think there was, if there was I don't remember it.

Q. Do you remember whether anything was said in regard to rate or valuation?

A. No, sir, not anything.

Q. What was done with the paper after Mr. Rankin signed it?

A. He handed it back to the agent, I disrem-ber his name—Smith I think, I had been there a few times and did not know his name but I went down there with him this time and he told the agent that his father would be there, that he was going with the mules and he would be there the next day and get the contract.

Cross-examination.

Questions by Mr. ALLISON:

Q. You are one of the parties, one of the plaintiffs, in this case?

A. No, sir, I am not interested at all.

Q. I did not catch your name—what was your name?

A. David Rankin.

Q. You are an uncle of these other Rankins?

A. Yes, sir.

Q. So you are not interested in this suit?

A. No, sir.

Q. You went in with your nephew at the time the bill of lading was issued and saw your nephew sign it?

62 A. Yes, sir.

Mr. LYNCH: I am perfectly willing that you may treat your depositions as read; we have not anything to contradict them; we made the same exception as to the other *proff* relative to the valuation and we are willing to let the record show that your honor made the same ruling and we made the same exception.

Mr. FOX: Mr. Robinson states that he saw the mules in Atlanta.

Mr. LYNCH: We have nothing on that subject; we will treat them as read too. There is one thing in regard to the market value in

Atlanta; we object to the market value in Atlanta because we say that would not be the measure of damages in any event.

Mr. MILLER: We will submit that question to his Honor and let him instruct the jury in regard to it.

Depositions introduced for the plaintiff, as follows:

Depositions of J. H. Goggin, Montie Fox, Jake Robinson & Wilson Aluxander.

Filed January 6, 1913.

In the Circuit Court at Chattanooga, Tennessee.

THOS. C. RANKIN et al.
vs.
C., N. O. & T. P. RY. CO.

The defendant is hereby notified that on Friday, December 27, 1912, at the law office of Chas. C. Fox, Danville, Kentucky, above plaintif-s will take the depositions of Davis Rankin, Sr., Chas. Rankin, Montie Fox, Jake Robinson, James Baughman, John Goggin, H. L. Pence, Wilson Alexander and perhaps other witnesses, to be read as evidence on the trial.

Said depositions will be commenced at 9 o'clock A. M. and continued from day to day until completed.

63

W. B. MILLER,
Attorney for Plaintiffs.

Due and legal service acknowledfe, December 15, 1912.
PRITCHARD, ALLISON & LYNCH,
Attorneys for Defendants.

THOMAS C. RANKIN et al.
vs.
C., N. O. & T. P. RAILWAY CO.

The Depositions of J. H. Goggin, Montie Fox, Jake Robinson and Wilson Alexander, witnesses for the plaintiffs in the above styled cause, taken upon notice hereto attached on the 27th day of December, 1912, at the office of Chas. C. Fox, in the town of Danville, Kentucky, in the presence of M. M. Allison, Attorney for the defendant, and Chas. C. Fox, Attorney for the plaintiffs.

It is agreed between the parties that the depositions may be taken in *the* short-hand and afterwards typewritten, the signature of the witnesses being waived, all other formalities as to caption and etc., are also waived.

Also waive the taking the depositions by Mary A. Powers who is in the employ of plaintiff's attorney.

Given under our hands this the 27th day of December, 1912.

PRITCHARD, ALLISON & LYNCH,
Attys. for Defendant.

CHAS. C. FOX,
Attorney for Plaintiff.

64 The said witness, J. H. GOGGIN, being first duly sworn, deposes as follows:

Questions by Plaintiffs' attorney, CHAS. C. FOX:

Q. Please state your name, age and residence?

A. J. H. Goggin, I am forty-five years old, I live in Lincoln County, Kentucky, my Post Office is Hendersonville.

Q. State what business you are engaged in and what experience, if any, you have had in the handling of mules?

A. I am a farmer, and I usually handle a few mules every year.

Q. State whether or not you say any mules last fall that belonged to Thomas C. Rankin and David Rankin?

A. Yes, sir.

Q. Did you examine the mules so as to form an opinion and estimate of their condition and their value?

A. Yes, sir, I looked through them.

Q. How many mules did they have at the time you saw them and looked through them?

A. Well, I expect there were fifty mules in the barn.

Q. Were any of the mules which you examined at that time subsequently shipped south by the Rankins?

A. Yes, sir.

Q. Did you see enough of the mules to form an estimate of their value?

A. Yes, sir.

Q. Were you familiar in November, 1911, with the value of mules in Atlanta, Georgia?

A. Yes, sir, pretty well.

Q. Do you know the mules that were shipped out of the lot that you speak of seeing at Mr. Thomas C. and David Rankin's—that were shipped out of this lot to the south about November, 6th,

65 1911—do you know how many were shipped out?

A. I think there were about eighteen or nineteen—nineteen probably.

Q. State how the nineteen mules that were shipped out of the bunch that they had on hand compared with the balance of the mules?

A. Well, Mr. Rankin—they picked out the top, the best mules and shipped them.

Q. What would these 19 mules—what would they have been worth on the market in Atlanta, Georgia, in November 1911, being shipped from here about the 6th of November, and being due there about the 8th or 9th of November—what would they have been worth upon the market after taking out the actual cost of transportation and feeding and handling of the mules between Danville, Ken-

tucky, and Atlanta, Georgia—what would they have been worth per head, taking out this cost?

(Defendant excepts to the foregoing question and answer, because the market value at Atlanta, Georgia, is not the measure of damages in this suit, and also because the witness has not qualified by showing that he knows anything about the value of mules in Atlanta, Georgia.)

Exception overruled, and appeal prayed and granted.

A. Well, I would thing they were worth about $235.00 in Atlanta, Georgia.

Q. Please state on what you base your judgment as to the value of these mules in Atlanta, Georgia, and what knowledge you had at that time of the market in Atlanta, Georgia?

A. I was there just a few days after this and saw mules bought and sold upon that market—that is why I base my knowledge.

Q. Mr. Goggin, please state what in your judgment, would have been the value of these mules per head—these nineteen mules, that were shipped south by the plaintiffs in this case—what would have been their value in Danville, Kentucky, on the 6th day of November, 1911?

66 (Defendant excepts to the foregoing question because the measure of damages is fixed by the contract.)

Exception overruled and appeal prayed and granted.

A. Well, I would think they were worth $229.00 or $230.00 per head—about six I think it cost us to ship them and feed them.

Q. State the condition, Mr. Goggin, of these mules, especially the nineteen mules that were shipped by the Rankins?

A. Well, they was a bunch of fat, nice mules, in good condition.

Q. Do you know how long they have owned them, and how they handled them after they bought them?

A. Yes, sir, they commenced buying them about the first of August and put them right in the barn and fed them until time to ship them.

Cross-examination by M. M. ALLISON, attorney for defendants:

Q. Were you present in Danville at the time these mules were shipped?

A. No, sir.

Q. You did not see the mules that were actually shipped, them?

A. I did not see them on that day.

Q. How do you know which ones of the fifty mules were shipped?

A. Well, I seen the whole pen of mules before he shipped them—several times—and I was back there in just a few days after he shipped them, and these top mules were all gone.

Q. Do you know whether he made more than one shipment?

A. Just one.

Q. How do you know that fact?

A. Well, sir, that was the only load of mules they shipped. Mr. —— told me that was the only mules he shipped, he told me he had shipped that load of mules.

Q. Then—all you know about the mules that were actually shipped by the plaintiffs is what *they* told you, you did not see them shipped?

67 A. No, sir.

Q. Do you know where they were shipped, except by what they told you?

A. No, sir.

Q. Now, you say you looked over about fifty head of mules——

A. Yes, sir.

Q. Could you state the value of any particular mule in that bunch of fifty?

A. Well there were a few pairs that I could put an estimate on.

Q. You say they were in good shape and fat?

A. Yes, sir.

Q. What were the ages of them?

A. Well, I from their appearance, looking over them, I would think they were from four to six years old.

Q. You do not think you saw any in the bunch over six?

A. I do not believe they were, judging the outside appearance.

Q. You place your valuation on the mules taking into consideration the fact that they were fat, and their ages, what else do you take into consideration?

A. Well, I take their form—the way they are built.

Q. You know anything about what any of these mules cost here in Danville, or around this country where they were bought?

A. Just a few pair of them.

Q. Do you know that from hearsay, or your own knowledge?

A. Well, sir, I saw part of them I saw Mr. Rankin pay for them.

Q. You have been estimation these mules on the average?

A. Yes, sir.

Q. Do you know what these mules cost?

A. No, I do not know what the average cost.

Q. What you know of the Atlanta market, you got simply by being in Atlanta?

68 A. Yes, sir, and also from the quotations from Atlanta market before I went there.

Q. Now, you do not know which ones of the mules were injured or which ones were killed or which one were sould after the wreck?

A. No, sir. I do not.

Further deponent saith not.
(Signature waived.)

Also the deposition of WILSON ALEXANDER, taken at the same time and place, pursuant to the same notice, and for the same purpose stated in the caption.

Said witness being of lawful age, and being first duly sworn, depose- as follows:

Questions by CHAS. W. FOX, plaintiff's attorney:

Q. Please state your name, age and residence.

A. Wilson Alexander, residence is in Lincoln County, and my age is thirty-five.

Q. State what business you are engaged in, and what experience, if any, you have had in the handling of mules, and in buying and selling mules?

A. My main business is farming, and in connection with farming I handle some mules, this makes the third year *od* e[illegible]rience I have had in shipping mules to the sou*ghtrn* market.

Q. Did you see, or know some mules that belonged to Thomas C. and David Rankin, in the fall of 1911, that were shipped south by them in November, 1911?

A. Yes, *I*ir, I seen the mules before they were shipped.

Q. Where did you see them?

A. They were in the barn.

69 Q. Did you examine the mules so as to form an opinion as to their condition and value?

A. Yes, sir, I looked them close enough so I would know about what their value would be.

Q. Do you know what proportion of the mules that you saw in the barn about the 6th of November were shipped by Davis Rankin?

A. No, sir, I could not say just exactly what certain mules out of each barn were shipped, I did not see them after the mules were cut out and shipped.

Q. You only saw them in the barn together, then; you did not see them after they were—after a part of them had been shipped?

A. No, sir.

Q. Were *uou* familiar with the market value of mules in Atlanta, Georgia, the 9th or 10th of November, and the latter part of November 1911?

A. Well, I was on the Atlanta market about—just about the time that Mr. Rankin shipped their mules, I was there about a day and a half, about the 15th of November.

Q. What were you selling on the market?

A. I did not *see* anything there on the market at that time, I stopped at Atlanta. I shipped a load of mules from Danville, Kentucky and was trying to buy a couple of mules that we had a special order for to ship down with the others.

Q. How long were you in Atlanta, and what opportunity did you have to know the value, the market value, of mules at Atlanta?

A. I went out to the Union Stock Yards, and spent one evening there, and was there the next day until about 2:30.

Q. Did you during that time ascertain and find out the value of mules on the market in Atlanta?

A. Yes, sir.

Q. State in your judgment, what these mules would have
70 been worth on the market in Atlanta, November 10, 1911, and after that for a few days?

(Defendant excepts to the foregoing question because the market

value at Atlanta, Georgia is not the measure of damages in this suit.)

Exception overruled, and appeal prayed and granted.

A. In my judgement, those mules would have been worth two hundred and thirty to two hundred and forth dollars.

Q. How long did you say you had been handling and shipping mules south?

A. Three years.

Q. What, in your judgement, would Mr. Rankin's mules have been worth in Danville, Kentucky, on November 6, 1911, knowing the condition they were in?

A. In my estimation, they would have been worth from $220.00 to $225.00.

Cross-examination by Judge ALLISON:

Q. How many mules did you see in this lot before any mules were shipped?

A. Well—the best I can remember, there was two loads, I seen the mules in two different places, a number of mules were in D. F. Rankin's barn and a number in Mr. Robert Rankin's barn.

Q. About fifty in all?

A. About sixty—about thirty in Mr. Robert Rankin's barn.

Q. About ninety in all?

A. Yes, sir.

Q. Do you mean to say that each of these ninety mules was—would have brought on the Atlanta market $230.00 to $240.00?

A. Yes, sir.

Q. And that each of these mules here would have sold on
71 the market from $220.00 to $225.00?

A. Yes, sir.

Q. Did you notice in one of these lots a blind mule?

A. No, sir, I did not.

Q. Do you know how old these mules were?

A. No, sir, I do not.

Q. And you do not know whether any of them were blind?

A. No, sir.

Q. Do you undertake to say that you know what their physical condition was?

A. They had the appearance of being healthy mules.

Q. Were they broken?

A. I judge they were, they had the appearance of being broken mules.

Q. What size?

A. From fifteen and a half to sixteen.

Q. Without knowing whether these mules were broken to work or what their ages were, or whether or not any of them were blind, are you willing to still say that each of these mules would be worth in Atlanta $230.00 to $240.00 and in Danville, Kentucky, from $220.00 to $225.00?

A. Yes, sir, they all appeared to be first class Georgia mules, up in fine shape, and their appearances were extra good mules.

COPY BOUND TO CL

Further deponent saith not.

(Signature waived.)

72 Also deposition of MONTIE FOX, taken at the same time and place, pursuant to the same notice, and for the same purpose stated in the caption.

Said witness, being of lawful age, and being first duly sworn, deposes as follows:

Questions by Plaintiff's attorney, CHAS. C. FOX:

Q. Please state your name, age and residence—and also your business?

A. Montie Fox, stock business. What age?—forty-six years, residence Danville, Kentucky.

Q. How long have you been engaged in the stock business?

A. About twenty-eight years.

Q. What experience have you had in the buying and selling of mules in the twenty-eight years?

A. I have been buying and selling every year for about twenty-seven or eight years.

Q. Where have you been shipping them to from Danville?

A. Well, Atlanta—Dawson, Georgia, Cuthband, Georgia, and to other places in South Georgia and North Carolina.

Q. Did you see a bunch of mules that belonged to Thomas C. and Davis Rankin that were shipped south about the 6th of November 1911 and if so, state when you saw them?

A. I think it was along about that date I passed the mules in the street going towards the shipment.

Q. Do you know how many there were of them?

A. Only what Mr. Rankin said—nineteen.

Q. Did you see enough of the mules that day to form any estimate of their condition and value?

A. Yes, sir, the mules were going slow, and when I stopped I could see them pretty well.

Q. What was their condition?

73 A. It was good, the mules were fat, good size and were fresh looking mules.

Q. What was their condition as to flesh?

A. They were fat, and in nice condition.

Q. Were you familiar with the market price of this character of mules, and of mules generally, in Atlanta, Georgia, on the 9th and 10th of November, and after that, 1911?

A. Well, I was only acquainted with the market from quotation, I was only there about the 1st of January or the last week in December.

Q. State whether or not you did keep up with the market value of mules in Atlanta about the 10th of November by quotation?

A. Yes, sir, we kept up by quotation and letters all through the season.

O CLOSE IN CENTER

Q. In your judgement, what would these mules have been worth, and what would they have sold for on the market about the 6th of November, 1911?

(Defendant excepts to the foregoing question.)

Exception overruled and appeal prayed and granted.

A. I could give a more intelligent answer of the market here than I could at Aflanta.

Q. Well state, then, what they would have been worth here in Danville, at that time?

A. From what I have seen of the mules, I would think somewhere from $220.00 to $225.00.

Q. Would they have been worth more or less at Atlanta?

A. They were supposed to have been worth more.

74 Cross-examination by Judge ALLISON:

Q. You based your estimate of the value of the mules just from seeing them walking along the street?

A. Yes, sir.

Q. And you do not know anything about the condition of any of the mules so far as age, or being broken to work, or anything of that kind?

A. Yes, sir. The only way you could tell about the age without looking, is the appearance of the mule, and then a mule may be a fine looking mule and may be fat and have every appearance of being a first class mule and may not be worth very much on account of his quality and age; it might be unsoundness or that kind. usually you can tell a mule by his appearance, whether he is fat of thin.

Q. How many of these mules did you say you saw?

A. I did not count the mules, I think they said there were nineteen. Thomas and Davis Rankin's.

Q. Those mules belonged to these parties?

A. They were partners.

Q. Did you also see the Robert Rankin mules——

Objected to by plaintiffs' attorney.

Q. How did these mules compare with the Robert Rankin mules as to value?

A. They looked a little larger than the Robert Rankin mule.

Q. How did they compare as to value?

A. Fully as good, if not better, I would think they were worth a little more money.

Q. How much more?

A. Probably about $5.00 or $10.00.

Q. Five or ten dollars on the head?

A. Yes, sir.

75 Q. You testified in the case of Robert *Robert* Rankin against the C. N. O. & T. P. Railway, as to the value of the Robert Rankin mules, in the Circuit Court of Boyle County, do you remember what valuation you placed on the mules?

COPY BOUND TO C

A. I think from $200.00 to $225.00.

Q. Well then, if these mules were worth from five to ten dollars more than the Robert Rankin mules, these mules would be worth from $205 to $210.00?

A. I think the Robert Rankin mules were worth from two hundred or two hundred and ten to two hundred and twenty-five dollars, judging—of course, meeting a bunch of mules in the road, you can't tell just exactly, it is simply a rough estimate. Our mules were costing about $210.00 or $215.00.

Q. Were your mules the same grade?

A. Some were better, and some were not so good. Our mules were costing from $210.00 to $215.00.

Q. Were they better or worse mules than the mules you are testifying about now?

A. Some of them were better and some of them were not so good. I think this was a good bunch of mules.

Further deponent saith not.

(Signature waived.)

76 Also the deposition of JAKE ROBINSON taken at the same time and place, pursuant to the same notice and for the same purpose stated in the caption.

Said witness, being of lawful age, and being first duly sworn, deposes as follows:

Questions by Plaintiffs' Attorney, CHAS. C. FOX:

Q. Please state your name, age and your business.

A. J. A. Robinson, farming and stock raising—do you want me to tell *mu* age——

Q. If you want to?

A. Well, I don't——

Q. Mr. Robinson, what experience have you had in the handling of mules?

A. I have handled mules for fifteen or eighteen years.

Q. Were you in Atlanta, Georgia on or about the 19th or 20 of December, 1911, when a small bunch of mules were sold by the Patterson Commission Company?

A. I was in Atlanta from the 15th of December until the 25th of December, 1911.

Q. Did you see some mules sold there that were sold at public auction—or provate auction, whatever you call it—by the Patterson Commission Company, mules that has been shipped or part that had been shiped south by the Rankins?

A. I did.

Q. How were these mules sold, as whose property?

(Defendant excepty to the foregoing question.)

A. They were sold as the property of the Railroad Company, by the Patterson Commission Company.

Q. Do you remember how many mules were in the lot?

77 A. I think there was eight or nine mules, and a horse or two.

TO CLOSE IN CENTER

Q. Describe the condition of the mules that were sold?

A. They were in bad condition, they were bunged up, and the hair was very bad on the mules.

Q. State whether or not any of them were injured, and if so in what way?

A. Well, there was one mule with an eye out, and there was one mule with a neck drawn, a very stiff neck; there was another with possibly a rib or two broken and caved in at one side, and all of them were more or less bunged, and there was one mule in reasonably good shape, with the exception of a bunged hock.

Q. Can you now recall what these mules you have spoken of sold for—can you recall about what they brought on the market?

A. I cannot recall all the prices. I remember the best mule there, I bid on myself, but they brought from—I say from $50.00 to $165.00 somewhere along there.

Q. When the mules were put up and sold at public sale, how were they sold, as to their condition?

A. At the time these mules were put up, there was a statement made as to what was the matter—their condition.

Q. Were any of them sold as sound and all right?

A. There was—possibly one sold that way, but I believe they said she had a bunged hock.

Cross-examination by Judge ALLISON, Attorney for the defendant:

Q. Do you remember what the sound mule brought?

A. My bid on the sound mule was $160.00 or $165.00 she brought more than that.

Q. You do not recall what she did bring?

78 A. No, sir, there were several bids.

Q. How did this sound mule compare in size, age, flesh, etc., *when* the other mules, provided they had been sound?

A. She was not as good a mule as some of the others.

Q. Would she have been on the average?

A. No, sir.

Q. On account of what?

A. Her size, and general—appearance.

Q. You do not know what the condition these mules were in at the time they were shipped?

A. No, sir, I don't know, sir.

Q. Where is your home?

A. Four and a half miles from this town, in this County.

Q. From what you saw of those mules, assuming they had been sound, taking into consideration the general appearance of the mules, their ages, sizes, etc., what would you say that those mules would have brought on the market at Danville?

A. At that time?

Q. Yes, at the time they were shipped November 6, 1911?

A. Well, you see this was in December.

Q. On November 6th?

A. There was a drop in the*n* market between November and

December and if the mules had have been sound and all right, they would have been worth more in November than December at the time they were sold.

Q. How great a drop?

—. A difference of from fifteen to twenty-five dollars per head.

Q. You bought mules on the market in November, 1911, in the neighborhood of Danville?

A. I did.

Q. Assuming that the owners of these particular mules
79 before they were shipped on November 6, 1911, wanted to sell those mules at Danville, Kentucky, and a man could be found who wanted to buy mules, what would those mules — brought on the market at Danville, Kentucky?

A. You refer to the nine mules that were sold?

Q. Yes, I refer to the nine mules that you saw.

A. I only saw nine—those mules would have been worth from $190.00 to $200.00 at that time.

Q. Was Mr. Dave Rankin present at Atlanta when these mules were sold?

A. He was.

Q. Did he make any objection to the sales?

A. I did not hear any objection.

Q. Do you know whether those mules were tendered to Mr. Rankin before they were sold?

A. Mr. Rankin said something to me about it, I do not recall just what it was.

Q. Didn't he say to you in substance that the railroad company had offered those mules, and he declined to take them?

A. I think so.

Redirect examination by Mr. Fox:

Q. Did Mr. Rankin state why he refused to receive the mules that were tendered to him?

A. Yes, sir, he had had advice from his attorney not to receive them.

Q. Did he say why? Did the condition of the mules have anything to do with them, did he say why?

A. He said they were in bad condition, and he didn't see what he could do with them in the condition, *and he didn't see what he could do with them in the condition* they were in?

Q. You describe one mule being a sound mule that brought $160.00 was that mule sound in every particular?

A. No, sir, she was not, she had bunged hock. She was not entirely sound.

80 Q. You did not see the 19 mules that are being sued for in this suit before they were shipped from Danville, did you?

A. I did not.

Q. You do not know how, then, the mules that were sold at Atlanta December 19, 1911, compared with the other mules that were in the same load?

A. I do not.

A. I will get you again to state, Mr. Robinson, if these eight or nine mules which you saw on the 19th day of December, 1911, at Atlanta—if these eight or nine mules had have been sound and all right in every particular, and had have been in good flesh and in good condition for shipment south, and in good condition to be placed upon the market at Atlanta, Georgia, what is your judgment would these nine mules have been worth per head on an average, in Atlanta, Georgia, on the 9th, or 10th of November, 1911, if they had have been sound and all right and in good flesh?

(Defendant excepts to the foregoing question because the market value at Atlanta, Georgia, is not the measure of damages in this suit.)

Exception overruled and appeal prayed and granted.

A. They would have been worth from $200.00 to $235.00.

Recross-examination by Judge ALLISON, Attorney for defendants:

Q. How much would the injured hock on this one mule that you say was sound, with that exception, depreciate her value on the market?

A. Twenty-five to thirty-five dollars.

Q. And I believe you say this mule actually brought $162.00?

A. No, sir, I said my bid was $160.00 to $165.00, but she went higher than that, I believe Mr. Bughtman bough- her for $175.00.

Q. Do you think that if this particular mule had never had
81 this injured hock, she would have brought about $200.00?

A. Yes, sir.

Redirect examination by Mr. FOX, Attorney for Plaintiff:

Q. I will get you, please, to state again what was the drop in the mule market between October 10th, 1911 and December 19, 1911?

A. I think it was about $25.00 per head.

Further deponent saith not.

(Signature waived.)

STATE OF KENTUCKY,
County of Boyle:

I, Mary A. Powers, a Notary Public in and for the County of Boyle, State of Kentucky, do hereby certify that being a stenographer, I took the foregoing depositions of J. H. Goggins, Montie Fox, Jake Robinson and Wilson Alexander, in shorthand by agreement of parties by their attorneys, and the same were taken down by me in the exact language of the witnesses and correctly reduced to typewriting by me, and by agreement of parties by attorneys the reading of the depositions to the witnesses after being reduced to typewriting by me was waived by the parties, and the signatures of the witnesses were also waived.

I also certify that I am not interested in the casee, nor of kin

nor of counsel to any of the parties to this action, and that I sealed up said depositions in an envelope duly addressed to the Clerk of the Circuit Court of Hamilton County, Tennessee, and delivered same to the Post Office at Danville, Kentucky, without said depositions at any time being out of my possession or being altered in any manner after they were taken by me, and I also further certify that each and all of said witnesses were first duly sworn by
82 me before giving their depositions.

Given under my hand and official seal at Danville, Kentucky, this the 4th day of January, 1913.

MARY A. POWERS,
[SEAL.] *Notary Public, Boyle County, Kentucky.*

83 D. F. RANKIN, recalled for the plaintiff.

Direct examination.

Questions by Mr. FOX:

Q. Is the Cincinnati Southern Railroad the only direct line from Danville to Atlanta?
A. Yes, sir.

Cross-examination.

Questions by Mr. LYNCH:

Q. All of your shipments for a great number of years have been made over this same railroad, between Danville and Atlanta?
A. I have shipped some over the Souther-; I have shipped some from other towns and to other places; I have shipped a car load of mules to Louisville and they went over the other railroad because part of them had been at one place and part at another.
Q. But the greater part of your shipments have been over this same road?
A. Yes, sir.
Q. And you took the same course in the case of the bill of lading in each case?
A. Yes, sir.
Q. What is the other cases?
A. Over the L. & N.
Q. Does that run direct to Atlanta?
A. Not from Danville.
Q. You have shipped some from these other points to Atlanta over the L. & N.?
A. Yes, sir.
Q. Where was that other point that you shipped from?
84 A. About five miles from there, from S— south.
Q. You paid the same rate from this other point over the L. & N. to Atlanta?
A. Yes, sir.

Redirect examination.

Questions by Mr. Fox:

Q. He asked you whether you had signed bills of lading or contracts of shipment over this other road for the other shipments or other contracts over this road; Did you ever read one of these contracts?

A. No, sir.

COURT: I don't think that would be material.

Mr. MILLER: It would be material in this way; Mr. Lynch asked him if he did not take contracts with respect to other shipments like this one, and they were clearly all alike.

Mr. LYNCH: The answer of the witness was not exactly like Mr. Miller's answer.

Mr. MILLER: I said that that was the reason why we wanted to prove by this witness if he knew whether they were all alike, whether he had ever read any of them or not.

Mr. FOX: Does your Honor allow the witness to answer?

COURT: Yes, I will allow it to go in.

Exception for the defendant.

Q. Did you ever read any of these contracts at any time?

A. I never did.

85 C. L. HAYES, Sworn for the Plaintiff.

Direct examination,

Questions by Mr. MILLER:

Q. You are the clerk of this court?

A. Yes, sir.

Q. At this place?

A. Yes, sir.

Q. Please state whether or not in the case of Rankin vs. The Cincinnati Southern Ry. Co. there has ever been any money tendered into court by the Railway Company?

Mr. ALLISON: We admit there never has been.

Q. You formerly lived in Dayton, Tennessee?

A. Yes, sir.

Q. You were an Alderman up there?

A. Yes, sir.

Q. Were you at one time Clerk of the County Court of that County?

A. Yes, sir.

Q. I have a drawing here which I will submit to you; we will assume that 4th Avenue is located on the drawing at the place indicated and that the Hudson mill and the depot are located as you know that they are at Dayton?

A. Yes, sir.

Q. And the Cincinnati Southern Railway running through there as you know?

A. Yes, sir.
Q. And this the court house as you know?
A. Yes, sir.
Q. And Market Street and the other streets that are marked on that drawing; I will ask you whether or not that is substantially a correct portrayal of the northern portion of the town?
86
A. I would say it was.
Q. The line that is marked there as Fourth Avenue represents the northern boundary of the town of Dayton?
A. Yes, sir.
Q. Coming south from there the mill would be on the east side of the railroad, coming towards the depot?
A. [redacted]s, sir.
Q. What is the distance from Fourth Avenue down to the [redacted]?
A. It is about a block, I could not say positively but I would judge it was about 400 feet may be.

No cross-examination.
Mr. MILLER: We offer that drawing in evidence as Ex. #1 to Mr. Hayes' testimony.
(Here copy same or send up the original).
Plaintiff rests.

87 M. L. HARTMAN, Sworn for the defendant.

Direct examination.

Questions by Mr. LYNCH:

Q. Where do you live?
A. I live in North Chattanooga.
Q. What is your business?
A. Locomot-ve engineer.
Q. How long have you been a locomotive engineer?
A. About 10 or 11 years.
Q. For what company are you working?
A. The C. N. O. & T. P. Ry. Co.
Q. How long have you been working for that company?
A. About 14 years.
Q. How long have you been an engineer for that company?
A. About 10 and 11 years.
Q. I will ask you if you were on an engine on a train that was derailed at Dayton, Tenn. on November 7, 1911?
A. Yes, sir, I was.
Q. In which a lot of stock, mules, was killed?
A. Yes, sir.
Q. I will ask you what was the number of that train?
A. First 55.
Q. First 55?
A. Yes, sir.
Q. You were coming south were you with that train?
A. Yes, sir.

Q. That was the only train that was derailed there that day?
A. Yes, sir.
88 Q. At Dayton?
A. Yes, I believe so.
Q. Were you injured in that accident?
A. Yes, sir.
Q. How badly were you hurt.

Objected to. Objection overruled. Exception for plaintiff.

Q. What other railroad men were injured in that accident?

Objected to.

COURT: I don't see the necessity of going into that.
Mr. LYNCHS Why, may it please the court we want to show the extent of the wreck.

Q. Was that a double header?
A Yes, sir.
Q. You were on the front engine?
A. Yes, sir.
Q. Who was there with you?
A. The fireman and the conductor was on the engine.
Q. Who was the fireman?
A. Williamson.
Q. Where is he?
A. He was killed.
Q. In this accident?
A. Yes, sir.
Q. Who was on the engine behind you?
A. Engineer Patton and the fireman and also a brakeman.
Q. Well, how many cars were between the front engine and the back engine?
A. Three.
Q. What became of engineer Patton.
A. He was killed.
89 Q. In this accident?
A. Yes, sir.
Q. Now, did that accident occur within the *two* of Dayton?
A. Yes, sir.
Q. How far had you crossed the corporate limits, if you know?
A. Why, I expect a half mile.
Q. Had you blown the whistle?
A. Yes, sir.
Q. How long before you reached the point of the accident?
A. Oh, quite a little ways; I had whistled for the road crossing.
Q. What caused that accident that day.
A. By striking a cow.
Q. By striking a cow with your engine?
A. Yes, sir.
Q. How far was the cow from your engine when she appeared on the track?
A. You mean how quick did she appear?

Q. How far was the cow in front of your engine when she appeared upon the track?

A. Oh, I suppose 50 or 75 feet.

Q. Where did she come from, could you see?

A. Yes, I could see.

Q. Where did she come from?

A. She came from behind a car at the road crossing; where was a string of cars along there and there was a space there just wide enough for a wagon to get through and this cow came out from behind these cars, the first I saw of her.

90 Q. At what rate of speed were you running when the accident happene- when this cow appeared from behind these cars on the track?

A. Why, I was running 18 or 20 miles an hour when I first saw her.

Q. What did you do when you saw her?

A. Why, I applied the brake in emergency, the first thing I done.

Q. State whether or not you had already blown for that crossing?

A. Yes, sir.

Q. When you apply the brake in emergency what is the effect?

A. Well, it brings the train to a stop, it is the quickest way that you can stop but the use of the power of putting the brake in an emergency because that sets the brakes on the entire train.

Q. Did you have time to do anything else besides that?

A. That was all I had to do.

Q. When you struck the cow what happened?

A. Well, when I struck the cow, when the engine struck the cow, it knocked her in front of the engine and when she fell why the engine climbed upon her and it derailed the engine from the track.

Q. You mean that it knocked the cow in front of the engine?

A. Yes, sir; it knocked her in front of the engine and she fell back on the track between the rails.

Q. You were right upon her?

A. Yes, we were right upon the cow and it knocked her in front of the engine and she fell back on the track.

Q. When she fell back in front of your engine on the track then what happened?

A. Well, the engine climbed the cow and that threw the engine off the track.

Q. Derailed it?

A. Yes sir.

Q. Was there anything else that you could have done?

91 A. Nothing in the world that I could have done.

Cross-examination.

Questions by Mr. Fox:

Q. Mr. Hartman, you say that the time that you struck this cow you were coming through the town of Dayton at the rate of 18 or 20 miles an hour?

A. Yes sir.

Q. Before you struck the point where the accident occurred, there is a clear straight track there?

A. Yes sir.

Q. For some distance?

A. Yes sir.

Q. Probably half a mile?

A. Yes sir.

Q. You could see down the track for probably a half mile?

A. Yes sir.

Q. Before you struck the town of Dayton?

A. Yes sir.

Q. Now then you were then coming into the town of Dayton at the rate of 18 or 20 miles an hour?

A. Yes sir.

Q. You were going through the town?

A. Yes sir.

Q. Were you not going faster than that?

A. No sir.

Q. What enables you to say that you were not going faster than 20 miles an hour?

A. Because I know I was not.

92 Q. At what rate were you travelling?

A. Somewhere between 18 or 20 miles an hour.

Q. That train was behind your engine?

A. Yes, the train was behind it.

Q. And while you were travelling at that rate of speed your train struck a cow you say, at the first road that crosses the track there in the northern part of the town or was it on the other side, the lower part of the town?

A. It was the first street coming into town, just this side of a flouring mill there.

Q. I want to show you a little sketch here (handing plat to witness). Now, here is 4th Avenue and here is a street that crosses the railroad; this is north and this is south and here is your railroad track running along there and here is the flouring mill and this is 2nd avenue; Now where did you first see this cow?

A. The cow came from behind these cars that stood over here.

Q. Where was the cow just before your engine struck her?

A. She was over here coming towards the town of Dayton, west to the town of Dayton; I was going south and the cow was on the west side and was coming east; coming from the west.

Q. Over here is 4th Avenue and here is 2nd avenue.

A. I don't know.

Q. Where was the cow in reference to that mill, north or south of it?

A. She was north of the mill.

Q. She was crosing the track then on the road that crosses the railroad north of the mill?

A. Yes sir.

Q. North of that mill.

A. Yes sir.

93 Q. You speak of some cars being on the track there, some cars on the side track there?

A. Yes sir.

Q. How were they standing?

A. They had been pulled down the track and there was just space enough left there for one to go across.

Q. On what crossing?

A. The dirt crossing.

Q. Across the railroad track?

A. Yes, on the dirt crossing that crossed the railroad track and the cow was coming over this dirt crossing.

Q. It was not a street?

A. I don't know whether it is a public street or not, wagons pass through there.

Q. How wide was it?

A. Well, just looking at it as I passed by I should think it was 12 or 14 feet wide I guess.

Q. Never was a public street there?

A. I don't know, there might have been.

Q. How soon after you struck that cow was it that your train was wrecked?

A. It might have been two or three seconds.

Q. Was the whole train wrecked in two or three seconds or just your engine wrecked?

A. I was rendered unconscious and I don't know what took place after that.

Q. How soon after you struck that cow before your train left the track?

A. Oh, it could not have been more than a half minute.

94 Q. How far did the train travel after you hit the cow before it left t*y*e track in fact?

A. How far did it travel?

Q. Yes, that is the question. How far did the train travel after it struck the cow before it was wrecked?

A. I should judge 75 or 80 feet.

Q. Do you know where that mill is there near that crossing?

A. Yes sir.

Q. Did not that wreck take place right opposite that mill, just west of it?

A. Yes, it must have been a little north of it, a little north of that crossing as I understand it.

Q. Well, the *crowing* is north of the mill, is it not?

A. Yes sir.

Q. And where the cow was struck, and where she got on that crossing was just north of that mill?

A. Yes sir.

Q. And the wreck occurred in reference to the flouring mill where?

A. Right opposite the flouring mill; the train left the track just a little north of that but I don't know just how many feet but it was just a little north of it.

Q. How many feet did you say that train went after it struck the cow before the wreck came, that is it was derailed?

A. I judge about 75 feet.

Q. About 75 feet?

A. Yes, somewhere in that neighborhood.

Q. You were coming into the town of Dayton, were you?

A. Yes sir.

Q. Before you got to that crossing, why you knew that you were in the town of Dayton, when you struck that crossing. You knew when you would strike that crossing with your engine you would be in the town of Dayton?

95

A. Yes sir.

Q. Your railroad company has got a rule that requires you when approaching a public crossing in a town to get your train under control?

A. Why, yes, to have it under control.

Q. The rules of your company require you when you come to a public street in a town to get your train under control, does it not?

A. Yes sir, but that don't apply in all towns.

Q. Does it apply to the town of Dayton?

A. Yes, it applies to Dayton.

Q. It did apply to Dayton?

A. Yes sir.

Q. Have you not also got a rule which requires you in passing through a town or the railroad yards in a town to not run to exceed six miles an hour?

A. Yes sir.

Q. You violated that rule and the other rule in this case?

A. Yes sir.

Q. Violated both rules?

A. Yes sir.

Q. Those rules are made by your company for the safe dispatch of business and for the protection of human life and property?

Objected to. Objection sustained.

Q. Why are they made? Why do they make those rules?

Mr. LYNCH: I ask your Honor to exclude all of that evidence about a violation of the rules of the company because not alleged in the declaration.

96

Objection overruled. Exception for the defendant.

Q. Why is it that your company makes a rule that in approaching a public crossing you must have your train under control, why is that rule made?

Mr. LYNCH: Why, I object to that because the engineer has nothing to do with making rules that govern the management of the company?

COURT: If he knows let him state.

Exception for the defendant.

A. What is the question again?

Q. Why is it that your company makes a rule that on approaching a public crossing that you must have your train under control?

A. I don't know why they made that rule.

Q. Don't you know that it was made for the protection of life and property in general?

Objected to. Objection overruled. Exception for defendant.

Q. Don't you know that the purpose of that rule was for the protection of people who might be crossing the track there and to protect property that might be crossing the track there at that time?

Mr. LYNCH: We admit that that is true.

Q. At the time that you approached the crossing, approached that street crossing there in the town of Dayton you did not have your train under control; in other words can you tell this jury that going through the town at the rate of 20 miles an hour you had your train under control?

A. It depends how quick you want to stop.

Q. Well, how quick could you stop a train going at the rate of 20 miles an hour?

A. It did not take very far that day.

Q. You had a wreck that day?

97 A. Yes sir.

Q. How quick could it be done?

A. Well, that would depend in a great many things.

Q. Well, go ahead and tell the things on which it would depend; Tell the jury how long it would take to *stock* a train in the condition the track was that day and in the condition this train was that day, how many feet would it take to stop that train going at the rate of speed of 18 or 20 miles an hour?

A. The track don't have anything to do with stopping it.

Q. Could you stop a train just as well going down grade as you could up grade?

A. No sir.

Q. Then the track does have something to do with it?

A. The character of the grade does.

Q. And don't the character of the track have something to do with it?

A. Yes sir.

Q. How many cars were there in the train at the time of the accident?

A. 35 or 40 cars.

Q. Tell the court and jury how long a distance it would take to stop that train in the condition it was, in the condition of the track, with 40 or 45 loaded cars?

A. Well, I don't know whether the cars were loaded or not.

Q. Some of them were loaded?

A. I don't know.

Q. You don't know whether any of them were loaded or not?

A. No sir.

Q. Well, assume that there were 40 or 45 loaded cars in the train

and that they were going at the rate of 18 to 20 miles an hour, how long would it take you to stop that train under ordinary circumstances?

98 A. I could not tell you that exactly.

Q. It would take seven or eight hundred feet?

A. Well, I hardly think it would take that far.

Q. You testified at Danville in this same case, did you not?

A. Yes sir.

Q. Did you not say that there in answer to that question?

A. No, I did not say that, I did not say that it would take exactly that far because I don't know.

Q. I will ask you if this question was not asked you; In what distance could you stop if you were going 18 or 20 miles an hour, if something had come upon the crossing and did you not say in seven or eight hundred feet; Did you not make that answer?

A. That was the lawyer I guess that made that answer.

Q. Did you not make that answer?

A. Let me hear that answer again?

Q. Seven or eight hundred feet is your answer?

A. Exactly seven or eight hundred feet; you can read it that way if you want to but I don't care what you read.

Q. Did you or not make that answer?

A. If I made that I don't remember.

Q. You say you did not make it?

A. No sir, I won't say that I did not make it but I don't remember of making it.

Q. Do you tell this jury here now that travelling as you were and with that train you had and going slightly down grade at the rate of 20 miles an hour, do you tell this jury here now that you could not have stopped that train in a distance of 700 to 800 feet?

A. I don't know, I am not going to say because I never measured it or never tried it and I don't want to say that I could stop it in less than that and it might take longer and it might not.

99 Q. Was the track along there on either side as you approached the town of Dayton fenced, as you approached that crossing where you say the trouble occurred—was the track fenced along there anywhere?

Mr. LYNCH: He said he had been in the town for a half mile and what happened outside of that point for a half mile away is not competent.

Q. My question was whether or not the track was fenced on either side as you approached that crossing where the trouble occurred?

COURT: I think that would be immaterial; the law does not require the Company to fence it.

Mr. MILLER: Our point is to show that the track was not fenced so that people could go and come at will.

COURT: I don't think that is material.

Exception for the plaintiff.

Q. How far were you from that crossing when you blew your whistle?

A. I blew the whistle several times for the first road crossing when I got in the town of Dayton and then there is another about a block from there south; I blew the whistle all along there.

Q. I am talking about the crossing at the upper side of town where that trouble occurred, how far were you from that place when you blew the whistle?

A. Well, I suppose 25 or 30 car lengths.

Q. How far were you away from there when you put on your emergency brake that you have been talking about?

A. Well, about 50 or 75 feet.

Q. How soon after you saw the cow before you did that?

A. Two or three seconds I believe I told you a while ago.

Q. Where was your engine derailed in reference to that mill, was your engine derailed north or south of that mill?

A. North.

Q. What became of your engine after it was derailed?

100 A. That I don't know; I could not say; at the time that it was derailed I was knocked unconscious and I could not say anything about the wreck at all.

Redirect examination.

Questions by Mr. LYNCH:

Q. Mr. Fox asked you a while ago how far the engine ran after it struck the cow; immediately after it struck the cow it lifted the wheels of the engine from the iron rails and it ran a little piece on the wooden ties, did it not?

A. Yes sir.

Q. And then jumped the track?

A. Yes sir.

Q. And then the train was derailed?

A. Yes sir.

Q. When the train was derailed then you were knocked unconscious?

A. Yes sir.

Q. And those other men were killed?

A. Yes sir.

Q. That is a long, straight stretch of track there as you came into town?

A. Yes sir.

Q. Where you have got a view for a long distance ahead of you, a good view?

A. Yes sir.

Q. You were asked about having the train under control; what do engineers consider having a train under control?

Objected to. Objection overruled. Exception for the plaintiff.

101 A. Where they can see any reasonable distance and can stop the train in any reasonable distance.

Q. You state I believe that you could see here a half a mile ahead of you?

A. Yes sir.

Q. Now, there had been other cows, had there not, and they had passed entirely out of your sight before this other cow appeared in sight?

A. Yes sir.

Q. Did these other cows do anything towards the derailment?

A. No sir, the other cow that caused the wreck came out from behind the cars that were standing there and started across the track.

Q. Were there any other cows in sight?

A. No sir, there was no other cows in sight.

Q. I will ask you whether or not running at a slower rate than 20 miles an hour, say as low as 10 miles or six miles an hour, state whether or not that lessons or increases the danger of derailment whe*b* you strike a cow on the track?

A. Well, as a rule we have more wrecks on account of cattle where they are running slow than where they are running fast.

Q. Why is that?

A. Well, because where you hit stock when you are going fast they generally knock them clear off the track.

Q. And they do not fall back on the track and fall under the engine?

A. No sir.

Q. Now I will ask you whether or not it is true that the faster you are running the more apt you are not *do* derail the engine if you strike an object on the track?

A. Yes sir.

Q. I will ask you whether or not that is true with these
102 through freight trains?

A. Yes sir.

Q. I will ask you whether or not you engineers on these through freights are accustomed to run through the smaller towns like Dayton at as high a*b* rate of speed as you were running that day?

A. Yes sir.

Mr. Fox: I object to that; what they did in other town- is immaterial in this case.

Mr. Lynch: It is admitted that the rule was passed for the protection of freight that was being carried, therefore unless there is shown to be some proximate connection between the violation of the rule and the injury to the stock, why a violation of the rule would not be negligence; therefore if these rules were violated by other engineers of the company and with the knowledge and consent of the company and that it was the custom for other engineers of the company to violate them and that it was acquiesced in by the company, that destroys any idea of negligence growing out of it.

The Court: I don't see the materiality of it.

Exception for the defendant.

Mr. Lynch: Your honor will not allow us to prove that it was customary to run at that rate of speed through towns of that size?

Court: No sir.

Mr. Lynch: Your Honor understands *any* object in wanting to prove that; it raises the presumption that there was no danger in

doing it, and rebuts the presumption that there was any danger from it or from any question that might be raised in reference to it.

Q. I want to ask you whether or not from your experience you ever knew an accident in a town of that size as a result of running through a town of that size at that rate of speed?

103

Objected to. Objection sustained. Exception for the defendant.

Mr. LYNCH: Your Honor will allow the answer to be put in the record?

COURT: Yes sir.

(Had the witness been allowed to answer the question he would have stated: "No, he had never known of such.")

Recross-examination.

Questions by Mr. FOX:

Q. I believe you stated to Mr. Lynch that as you approached the town of Dayton you saw a cow upon the track and that the faster you went the less likely you were to have an accident, that is the less likely you were to have an accident if you were going fast than if you were going slow; if that be so why did you slow up your train?

A. I said that the cow would be more likely to get under the engine if you were running slow than if you were running fast.

Q. You say that you would be more likely to knock the cow off the track if you were running fast?

A. Yes, sir.

Q. If that was true why did you put on the emergency brake?

A. Well, I thought it was necessary to stop as quick as I could.

Q. Yet you say if you were running fast there was less likelihood of having trouble from that cow?

A. Yes, I said that.

Mr. LYNCH: Why, the law of the State requires that.

Q. Why did you put on the emergence brake if you were less likely to have an accident from that cow if you went fast?

A. Because I wanted to stop as quick as possible.

104 Q. Why?

A. Because I wanted to stop.

Q. Is it not a fact that the faster you went the less likely you would be to have an accident?

A. I don't know that that was the object.

Q. Did you not say so a while ago?

A. I said as a general rule that was so.

Q. That is your experience?

A. That is my experience; that is cows are knocked off of the right of way more when you are running fast than when you are running slow.

Re-redirect examination.

Questions by Mr. LYNCH:

Q. State whether or not the rules of your company require you to stop as fast as you can when you see anything on the track?

A. No sir.

Q. No—what? Where there is danger of a collision to stop as quick as you can?

A. Yes sir, stop as quick as you can.

Q. And you were obeying the rules of the company to stop as quick as you could when you saw this cow?

A. Yes sir.

Q. And you were trying to stop back there?

A. Yes sir.

Q. And if you have been able to stop back there, of course there would not have been a wreck?

A. No sir.

Defendant rests.

105 CHARLEY HAWKINS, sworn for the plaintiff.

Direct examination.

Questions by Mr. FOX:

Q. Where were you living in November, 1911?

A. Dayton, Tennessee.

Q. Did you see the wreck there on the railroad in November 1911 in which some mules were killed?

A. Yes sir.

Q. Just tell the jury what you saw.

A. Well, I was down there near to the railroad crossing between 2nd and 3rd Avenue possibly, and the train was coming south and there was some cows in a cut there and it struck them cows and wrecked it.

Q. You are familiar with the streets there in Dayton?

A. Yes sir.

Q. We have got a little rough sketch or a map, suppose that is 4th Avenue, and that 3rd Avenue, and this 2nd Avenue, and this the mill and right along here is the railroad track; now, where were you located in reference to 3rd Avenue or 4th Avenue or 2nd Avenue where were you standing?

A. I was standing right here at that crossing (indicating on the map).

Q. At 2nd Avenue?

A. Yes sir.

Q. Where did you see that train?

A. I seen it away up the railroad.

Q. How far could you see up there?

A. Well, I suppose about three-quarters of a mile or a mile or something like that.

Q. Where did you see the cows back up in there?

106 A. I never seen the cows until the train got about 4th Avenue.

Q. Then where did you see the cows?

A. I seen the cows coming on the railroad, right in there about the mill.

Q. Were the cows south, down towards 3rd Avenue?

A. Yes sir.
Q. Where were they in reference to the railroad, right on the track?
A. Yes sir.
Q. They were in full view of the engine coming down?
A. Yes sir.

Mr. LYNCH: Don't lead him; just as- him what he saw there.

—. Could the man on the engine have seen those cows on the track there?

Objected to. Objection sustained.

Q. Well, were the cows in sight of the engine?
A. Yes, the cows was in sight of the engine when I seen them.
Q. Could the engineer have seen them if he had been looking out ahead?

Objected to.

Q. After it hit the cows than what occurred?
A. After the train hit the cow then it commenced to bobble on the track and then they commenced to leave the track and I think that may be it run down there and the next I seen things commenced to pile up there.
Q. Was there another train there at that time?
A. There was a train and engine coming in on the D. C. & I. track and it was coming over the frog there, right here at this crossing.
Q. This is 2nd Avenue, that you are talking about?
A. Yes sir, the train and engine went in the siding there and run up against some cars that was there.
107 Q. Now, just to make it plain; This is 4th Avenue?
A. Yes, sir.
Q. Where were the cows on the track when they were struck by this train?
A. Right opposite the mill.
Q. How far up the track could the engineer have seen those cows?

Objected to.

Q. How far was the track staright there?
A. Well, the track is straight there—I could not say how far up there he could see.
Q. How fast was this engine travelling when it struck these cows?
A. Well, I could not say that and be positive about it.
Q. Give your best judgment about it?
A. It seemed to me that it was going about 40 or 50 miles an hour; it looked to me like that but of course I could not say.
Q. Have you ever had any experience in watching trains to note their speed?
A. Yes, I have stood and watched trains go by.
Q. When that engine struck the cows where did the wreck occur, where was the train demolished and derailed in reference to the mill?

A. Well, it occurred right in here, right by the mill, up here about what they call the Morgan coal yard.

Q. How far below 4th Avenue was that?

A. Well, it was right along here (indicating on the map).

Q. How far from 4th Avenue or 3rd Avenue—there is a big hill comes in here at 4th Avenue, is there not?

A. I think there is.

Q. About what distance from 4th Avenue or 3rd Avenue?

A. About 300 feet I guess.

Q. How far is it from 3rd Avenue down to where this accident occurred, where the derailment occurred?

108 A. Well, it was about maybe 50 or 75 feet or something like that.

Q. Then it was about 350 to 375 feet from 4th Avenue down to where the accident occurred?

A. Yes, sir.

Q. To where the cows were on the track?

A. Yes, sir.

Q. I will ask you whether or not there is a kind of a hill or bluff on the west of the railroad there?

A. Yes, there is a hill there.

Q. How far does that hill or bluff run?

A. Well, that hill sets in about 4th Avenue, and comes down here to 2nd avenue but it is not so steep down here, there is a kind of a fill right there.

Q. Is there any bluff beyond 4th Avenue?

A. No, sir.

Q. How is the track there, is it then in a cut there?

A. No, sir, it is clear there.

Q. Did you see the mules that were unloaded after the wreck?

A. Yes, sir, I seen the mules.

Q. Did you examine them yourself?

A. No, sir.

Q. Know how many were killed?

A. No, sir.

Q. Were any of them killed?

A. Yes, several killed.

Q. You did not examine them closely to see anything about their injuries?

A. No, sir.

Q. About what time of day was that?

109 A. It was somewhere about 2:30 or somewhere along there.

Q. You speak of some cars of the Dayton Coal & Iron Company, where were they?

A. It was right down here at 2nd Avenue; there was a kind of a big vacant lot along here.

Q. How long had you been there before you saw this train approaching coming down the track?

A. Well, I had not been there very long I don't think.

Q. When you first saw the train and the cows how far was that train from the cows, in your best judgment.

A. Well, I seen the train coming and then I seen the cows. The cows just appeared all at once.

Q. Then how far was the train from the cows when you first saw the cows?

A. They was right at the cows when I seen them, seen it hit them.

Q. Where were the cows at that time?

A. They were right there opposite the mill.

Q. Some 300 or 350 feet south of 4th Avenue.

A. Yes, sir.

Q. Crossing the railroad?

A. Yes, sir.

Q. Were they on the switch track or the main track of the railroad?

A. They seemed to be on the side track but they just got on the main track.

Cross examination.

Questions by Mr. LYNCH:

Q. Where were you standing?

A. I was standing at the 2nd Avenue crossing.

Q. How far from the crossing where the accident occurred.

A. Why, I suppose it was 75 feet.

110 Q. You could see the train coming for a long ways, coming on a clear track?

A. Yes, it was a clear track there.

Q. You are not an expert on the rate of speed at which trains run, are you?

A. No, sir.

Q. And you don't know as a fact, how fast that train was running?

A. No, sir.

Q. And you would not pretend to say that you know how fast it was running?

A. No, sir, I would not.

Q. Now then, the train only struck one cow?

A. Yes, there was one or two cows there, I ain't positive how many.

Q. You are not positive whether there was one or two cows there?

A. I know that it struck one.

Q. When the cow appeared on the track the train was right there?

A. Yes, sir.

Q. The accident occurred almost instantly?

A. Yes, sir.

Redirect examination.

Questions by Mr. FOX:

Q. Did those cows come down the street and get on the track, did you see the cows coming down the street from the west?

A. No, sir.

Q. When you first saw them they were already on the track?

A. They was on the track there between that big hill and the mill,

This was all the testimony that was introduced on the trial of this case.

111 In this case the attorneys for plaintiff and defendant, being unable to agree upon a narrative form of bill of exceptions, and both sides agreeing that in this case a statement of the testimony in narrative form cannot get the case so completely before the Court as the stenographic report, both sides join in asking the Court to embody the testimony from the stenographer's notes as part of the bill of exceptions, which is done.

W. B. MILLER,
Attorney for Plaintiff.
PRITCHARD, ALLISON & LYNCH.
Attorneys for Defendant.

SATURDAY, March 1, 1913.

COURT: The principal points involved in this case have been ably argued but the Court is of the opinion that the one controlling point in this case is as to whether or not there is a presumption in favor of the defendant's compliance with the law whereby it seeks by its action to escape from liability.

There is no question but that the Croninger case, all other cases being out of the way, is the controlling case and overrules the cases of Stone & Haslett vs. The Railroad and of The Railroad vs. Smith, two Tennessee cases.

But the question arises in this case whether or not the defendant is favored with the presumption as stated.

There is no doubt in the mind of the Court but that if the Railroad were charged with a violation of the provisions of the Interstate Commerce Act, a presumption in favor of its compliance
112 would arise; but where the Railroad, as in this case sets up, as a matter of defense, its compliance with the provisions of that Act, the Court is of the opinion that there is no presumption in its favor and that the burden of proof is on the defendant to show a substantial compliance with the provisions of the Act.

In the Croninger case there was a demurrer and what might be considered an intimation that something further was done by the defendant and the Court speaking through Mr. Justice Lurton reviews the demurrer and speaks in regard to it, but it is only a surmise.

"It therefore follows that under the facts in this case, the undisputed facts and the decisions of our courts on this subject, that the court is of the opinion that the contract in this case is invalid and the question goes to the jury as to the negligence of the defendant on this shipment of stoke."

(The foregoing statement was made to counsel, in the presence and hearing of the jury, but was not addressed to the jury as a part of the regular charge.)

Gentlemen of the Jury:

The plaintiff sues the defendant, the C. N. O. & T. P. Railway Company for the sum of $4750.00 and interest, alleging that they delivered to it for transportation 19 mules to be transported to Atlanta, Ga., and that the carrier, the defendant failed to deliver the mules.

If you find from the proof in this case that the plaintiff did deliver in good condition 19 mules to the defendant to be transported to Atlanta, Ga., and that there was an accident, a collission on the railroad, then the burden is upon the Railway Comapny to show that it has not been guilty of any negligence.

113 If the defendant Company shows you by the greater weight or the preponderance of the evidence its freedom from negligence, then the plaintiff is not entitled to recover.

If you reach the conclusion that the plaintiff has made out his case and is entitled to recover for the value of the 19 mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value, at the time they would have been delivered but for the negligence of the carrier, less whatever transportation charges there would have been on this car of stock.

It is also in the discretion of the jury to award interest on any recovery from the time of the loss up to the present time.

Mr. MILLER: I ask your Honor to define to the jury what negligence is.

COURT: Gentlemen of the jury, negligence is the want or lack of exercise of that degree of care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals. Take the case.

The jury returned a verdict for $4508.82 in favor of the plaintiff and judgment was entered accordingly.

The defendant made the following motion for a new trial:

114 The defendant tenders this, its bill of exceptions to the judgment of the Court overruling its motion for a new trial, which is signed, sealed and ordered to be filed and made a part of the record.

NATHAN L. BACHMAN,
Judge, etc.

This 12th day of April, 1913.

O. K.
W. B. MILLER,
For Plaintiff.
PRITCHARD, ALLISON & LYNCH,
For Defendant.

115 *Rule Docket Entry.*

19944.

D. F. RANKIN et al.
vs.
C., N. O. & T. P. RY. CO.

In an Action of Damage in the Sum of $5,000.

Cost Bond, W. B. Miller.
4/22/'12, Cost bond taken and filed.
4/22, process issued for defendants. 4/30, Ex. on W. C. Shepherd, Agent. Henderson, D. S. 9/23, Declaration filed and copy issued 10/19, 10 days allowed to file plea. 11/25, Plea not guilty of C. N. O. & T. P. Ty. Co. and 6 special pleas filed and copy issued.
1/6/'13, Deposition of J. H. Goggin, Wilson Alexander, Montie Fox and Jake Robinson received by mail and filed. 1/20, Motion to file additional pleas. 1/20, special pleas filed and copies issued. 1/29, Agreed order to prepare and try. 1/31, Motion to amend second count of dec. filed and copy issued. 2/19, Declaration amended. 2/19, Issue joined on 9 Pleas filed and copy issued.
2/25, 4 sp. pltf. Ex. 3, N. E. 1, R. B. Harrism D. S. Rhea County, 5 spas. pltf. service acknowledged. 3/10 Mary A. Powers, Stenographic Bill, $8.70 filed.
2/28, Jury respital. 2/29, Judgment vs. Deft. $4508.82 and cost.
3/4, 10 days' additional time for filing motion new trial.
3/12, Motion for new trial filed and copy issued.
3/21*m* Motion overruled, appealed.
3/17, Appeal bond filed.
4/12, Bill of exceptions filed.

116 *Bill of Cost.*

#19944.

D. F. RANKIN, etc.,
vs.
C., N. O. & T. P. RY. CO.

State and County Tax	5.00
Clerk Hayes, Bond 50c, Surety 25c; writ 75c; docketing 60c; Assignments 50c; Dec. 25c; 2 pleas, 50c; 9 Subs. 90c; 1 D. T. 25c; 20 Wit. Prob. $1. 3 motions, 75c; 6 Orders $1.50; 6 Notices, $1.50; Judgment 75c; Filing depositions, $1. Issue Journal filed 25c; Bill of cost, 50c; Jury 10c	11.85
R. B. Harris, D. S. 5 spas. $1.25. 1 N. E. 10c	1.35
Mary A. Powers, Taking depositions	8.70

Witness, Chas. Hawkins,	4 days,	1 trip 56 miles.....	8.80
" Robt. Rankin	4 days	448 miles out of county	28.40
" H. L. Price	4 days	" " " " "	28.40
" David Rankin	2 days	" " " " "	28.40
" J. L. Henry	2 days	58 miles.....	5.90
" J. L. Godsey		" "	5.90
			127.70

Clerk Hayes, Transcript to Court of Civil Appeals, 34,500 words at 10 ct. $34.50; Order Appeal, 25c; Bond, 50c; Sureties, $1.25; Bill of Ex. 25c; Bill of cost; 50c; Seal 50c; Express, 25c..... 38.00

117 *Certificate.*

STATE OF TENNESSEE,
Hamilton County:

I, Charles L. Hayes, Clerk of the Circuit Court in and for said State and County, do hereby certify that the foregoing pages of words and figures contain a full, true and perfect transcript in the case of D. F. Rankin vs. Cincinnati New Orleans & Texas Pacific Railway Company, as the same appears on file and of record in my office.

Witness my hand and official seal, at office in Chattanooga, Tennessee, this April 16, 1913.

[SEAL.] CHAS. L. HAYES, *Clerk.*

118 Filed June 30, 1913. S. E. Cleage, Clerk; Jas. T. Joy, Deputy Clerk.

No. 1.

In the Court of Civil Appeals, Knoxville, Tennessee.

No. 23. Hamilton County Law.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

D. F. RANKIN and T. C. RANKIN, Defendants in Error.

Assignment of Errors and Brief for Plaintiff in Error.

May it please the Court:

Briefly stated, the material facts in this case are that on the sixth day of November, 1911, defendants in error, D. F. and T. C. Rankin, delivered to the plaintiff in error, the Cincinnati, New Orleans & Texas Pacific Railway Company, nineteen (19) mules, for transportation from the place of delivery, Danville, Kentucky, to Atlanta, Georgia.

The shipment was made under a limited liability contract signed by the agent of the railway company, and D. F. Rankin, one of the defendants in error, in whose name the bill of lading was issued, and a copy of this bill of lading was filed with the declaration as an exhibit thereto.

The car in which the said mules were being shipped was derailed at Dayton, Tennessee, on account of a collision of the engine with a cow upon the track. A number of the mules were killed outright and a number were damaged as a result of the wreck.

119 The plaintiff's declaration contains two counts.

The first count alleges the delivery of the mules to the railway company and that said shipper agreed to pay "the full freight or tariff charged by the defendant for such transportation on the delivery of said mules at the point of destination; and the defendant accepted the said mules for transportation on the terms aforesaid and agreed and became bound to safely transfer and deliver same in the same sound condition in which they were received."

The declaration then alleged that the railway company failed to deliver the mules at the point of destination, as it had agreed and was bound to do, but instead, "wrongfully and negligently failed and refused to do so, and in fact negligently wounded, maimed, bruised, and—it is believed—killed all or a portion of said mules."

It was alleged that said mules were reasonably worth Two Hundred and Fifty Dollars ($250.00) each and that the said defendants in error were entitled to recover Forty-seven Hundred Dollars ($4,700.00) with interest.

The second count contains the same averment with reference to the delivery of the mules to the carrier. It refers to and exhibits as part of the declaration, the bill of lading issued by the railway company at the time of the receipt of the mules.

The declaration avers that while the bill of lading contains a provision that the railway company shall not be liable for more than Seventy-five dollars ($75.00) for each of said mules, it was insisted that said limitation was void for the reasons set out in the declaration, which will hereinafter be more fully described.

After setting out and exhibiting the bill of lading and alleg-
120 ing that the limited valuation clause was void for the specific reasons assigned in the declaration the second count of the declaration then avers: "Defendant wholly failed to perform said contract of transportation; that it did not deliver said horses and mules or any of them to the connecting carrier at Chattanooga, Tennessee, but that the car in which said mules and horses were being transferred was wrecked because of the negligence and carelessness of defendant upon the line of defendant's railway near the town of Dayton, Tennessee, while in defendant's possession and a number of said horses and mules were killed and the remainder so badly damaged as to be almost worthless."

The second count makes the same allegation with reference to the value of the mules and the damage to the defendants in error as made in the first count.

(Record pp. 1 to 7.)

Later defendants in error amended their declaration so as to allege that there was an ordinance of the town of Dayton, Tennessee, regulating the rate of speed at which trains could be operated, and at the time of the accident which resulted in the injury to the mules, complained that the train was running at a greater speed than provided for in the municipal ordinance of the town of Dayton, and that because thereof the wreck occurred and the injury resulted.

(Record p. 17.)

Defendants' pleas are set out in the record at pp. 8 to 15. Briefly, these pleas are:

(*a*) The general issue.

(*b*) A denial that the limit of valuation clause in the contract sued on was void for any of the reasons set out in the declaration.

(*c*) Insistence that the defendants in error had delivered
121 the mules to the railway company and had represented that the value was Seventy-five Dollars ($75.00) each, and had secured a freight rate based upon that valuation and were estopped to dispute this valuation.

(*d*) That the defendants in error, having represented the value of the mules to be Seventy-five Dollars ($75.00) each and secured a rate based upon this valuation, they were guilty of a violation of the Act of Congress regulating Interstate Commerce by fraudulently obtaining transportation at an illegal rate by the suppression of the information as to the true value, and that hence they could not recover at all.

(*e*) Insistence that this was Inter-State shipment and governed by the Act of Congress regulating Inter-State Commerce.

(*f*) A denial of a *conversation.*

The case was tried in the Circuit Court at Chattanooga, Tennessee, at the January Term, 1913, and a verdict for $4508.82 was rendered by the jury.

(Record pp. 18 and 19).

The railway company made a motion for a new trial, which was over-ruled, and judgment for the amount of the verdict was rendered.

The railway company excepted and prayed an appeal in the nature of a writ of error to this Court, which was granted and perfected.

(Record pp. 19 to 24.)

Assignment of Errors.

The plaintiff in error insists that the judgment of the Circuit Court was erroneous and that the same should be reversed for the following reasons:

(1.) Because there is no evidence to sustain the verdict of the jury or the judgment of the court for any amount, the
122 testimony conclusively showing that the injury to the stock of the defendants in error was caused by an unfor-seen accident over which the plaintiff in error had no control and which

its agents and employees could not have avoided in the exercise of proper care.

(2.) Because the Circuit Court erred in charging the jury as follows:

"Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

(3.) The court erred in permitting the proof of the rules of the company with reference to the rate of speed at which the train should be run through the town of Dayton to be introduced, because neither the existence nor breach of such rules is alleged in the declaration, and, further, because it was shown and admitted that these rules were adopted for the protection of persons and animals in the town of Dayton and not for the protection of freight being carried by the railway company.

(4.) The Court erred in permitting the proof of the ordinance of the municipality of Dayton to go to the Jury, because there was no proof to show that said ordinance was legally and properly adopted.

(5.) The Court erred in declining to permit witness Hartman (The engineer) to testify that he was running the train at the time of the accident at the rate of speed at which such trains were usually and customarily run in Dayton and towns of like size, and that he was not running the train at a dangerous rate of speed at the time of the accident.

(6.) The Court erred in holding that as a matter of law the limited valuation clause was invalid, and in instructing the jury that if the defendants in error were entitled to recover, they were
123 entitled to recover the full value of the property.

(7.) The Court was in error in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the requirements of the Inter-State Commerce Act in filing its rates with the Inter-State Commerce Commission.

(8.) The Court erred in declining to sustain the limited valuation clause set out in the bill of lading.

(9.) The Court erred in permitting testimony to go to the jury as to the value of the mules, because this value was fixed by the terms of the contract at $75.00 for each mule.

(10.) The Court erred in permitting the defendants in error to testify that they did not read the bill of lading and did not know it contained a limited valuation clause.

Brief and Argument.

The Court will see that this case involves two general propositions,—one being the question of liability and the other the question of the validity of the limited valuation clause set out in the bill of lading.

The various errors assigned will be grouped and discussed under these two general headings.

The Question of Liability.

Under the common law rule adhered to by the Courts of this State*m* a carrier is not only liable for loss resulting from its negligence, but is an insurer of the safe delivery of all freight committed to its care against loss from any cause except that resulting from the act of God or the common enemy.

However, we insist that this rule is abolished by the recent amendment to the Inter-State Commerce Law, known as
124 the Carmack Amendment, passed June 29th, 1906, in which it is provided as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of ladin*f* therefor, and shall be liable to the lawful holder thereof for any loss, dama*f*e, or injury to such property caused, by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

(34 State. at L. 584, chap. 3591, U. S. Comp. State. Supp. 1911, p. 1288.)

The effect of this amendment was passed on by the Supreme Court of the United States in the recent case of Adams Express Company vs. Croninger. (Advance Sheets Vol. 33—No. 6—P. 129-219.)

With reference to the effect of this legislation, Mr. Justice Lurton said:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill *o*d lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

It will be noticed that this act does not provide that the carrier shall be liable as an insurer but shall only be liable for such loss or damage "caused by it."

With reference to this provision, Mr. Justice Lurton said:
125 "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the pri*m*a*m*ry carrier is required to issue*d* "For any loss, damage or injury to such property caused by it," or by any connectin*f* carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute*ly* insurer, a*b*d liable for unavoidable loss or damage, though due to uncontrollable forces,

That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common-law duty as a common carrier".

Under the facts of this case, it cannot be successfully insisted that the -jury to the plaintiff's property was "caused by" the plaintiff in error. There is no dispute with reference to the manner in which this accident occurred.

But two witnesses were introduced on this subject: Charlie Hawkins was introduced by the defendant in error and M. L. Hartman, the engineer in charge of the engine, the derailment of which caused the injury to the property in question. Each testified as to the manner in which the accident occurred and there is no substantial difference in their testimony. Mr. Hartman, the engineer, said that he was operating the engine on the train at the time the accident occurred; it was a through freight train going South, and was running about eighteen or twenty miles an hour. It was on a straight track and he could see the track ahead of him for perhaps half a mile. Just before he reached the road crossing inside the corporate limits of the town of Dayton a cow came suddenly upon the track about 50 to 75 feet in front of the engine. She came from behind an obstruction and the engineer could not and did not see her
126 approaching the track until just before she got on it. He says with reference to this: "She came from behind a car at the road crossing; there was a *trong* of cars along there and there was a space there just wide enough for a wagon to get through and this cow came out from behind these cars, the first I saw of her."

He states that he had already blown for this crossing and immediately when he saw the cow, he applied his brakes in emergency, which he says was the proper thing to do and the quickest way in which the car could be stopped. He says he did all he had time to do and that there was nothing else he could have done.

(Record pp. 87-88.)

When the engine struck the cow it knocked her in front of the engine and when she fell down in front of the engine, the engine clim-ed her—as he expressed it; that is to say, the wheels went up over the cow and this threw the engine from the track. In other words, when the engine struck the cow, it knocked her up in the air, but instead of falling off the track to one side or the other, she fell back on the track and immediately the engine wa*d* derailed by coming into collission with her and the wheels running up over her.

(Record p. 88.)

This testimony is not dispited in the slightest except that witness Charlie Hawkins says that he was under the impression the train was running about 40 to 45 miles an hour. He said on cross examination, however, that he could not tell how fast the train was running, and he would not pretend to say how fast it was running.

(Record p. 108.)

He says he was in plain view of the engine and the cross-
127 ing and saw the train coming for some distance. He was asked.

"When the cow appeared on the track the train was right there?"

Answer: "Yes sir.

(Record p 108.)

Now, manifestly, the engineer was not derelict in his duty with reference to keeping a look out ahead and doing everything possible to stop the train and prevent an accident after the cow appeared on the track, or after he had notice that she was approaching the track. The engineer testified that he did everything possible and this testimony was undisputed. He was amply sustained by the defendant's witness, Hawkins, who says that when the cow appeared on the track, the engine was right on her and that the accident occurred almost instantly.

The only negligence alleged in the declaration was the violation of an ordinance of the town of Dayton, which this — alleged forbids the running of trains through the corporate limits of the town at a higher rate of speed than ten miles an hour.

Manifestly this is the ground upon which the jury decided the case. In the first place, There is no competent proof that such an ordinance was ever adopted. Witness J. L. Henry, City Recorder for Dayton, was introduced, and he testified that he had in his possession a book of city ordinances, and read an alleged ordinance from this printed book. This was objected to by counsel for plaintiff in error because it was not the proper way to prove same.

(Record p. 27.)

The minutes showed that a committee was appointed to codify and publish the ordinances and that the committee made a report submitting a copy of said ordinances. (Record p. 27) which was adopted (Record p. 28).

Witness testified that the compilation handed him had
128 been printed and distributed as the ordinances of the town of Dayton.

(Record p. 28.)

Over the objection of counsel he also testified that this was used as a compilation of the ordinances of Dayton.

(Record p. 29.)

Under cross examination, he showed that he knew nothing of the manner of the adoption of the ordinances except what was shown on the minutes; that he had no way of knowing whether the printed copies of the ordinances contained the ordinances as adopted by the proper authorities.

(Record pp. 31-32.)

Turning, however, to the alleged ordinance, which appears on page 29 of the record, and reads as follows:

"SECTION 39. To run, or cause to be run in the City any railroad engine, train, or car, faster than at the rate of ten miles per hour,

or to run same over any street or crossing within the city without continuously ringing the alarm bell during the progress over and between said crossings."

The Court will see that this ordinance does not forbid anything. The ordinance does not attempt to make it unlawful to run trains through the town of Dayton at any rate of speed? The alleged ordinance is absolutely meaningless and can be just as well construed as a permission to run *ten* miles an hour as a prohibition.

Assuming, however, that this ordinance was legally adopted and that it does, in terms, prohibit the running of trains at a greater rate of speed then ten miles per hour—there are two conclusive reasons why the violation of this ordinance does not warrant a recovery against the plaintiff in error.

In the first place, the violation of this ordinance was not the
129 proximate cause of this accident. There is not the slightest testimony introduced to show that there was more danger of a derailment resulting from a collission from the engine and the cow while the train was running at twenty miles an hour or forty miles an hour than if the train had been running at ten miles an hour or five miles an hour. The only testimony on this subject was that of witness Hartman who was an experienced engineer and who testified that there was more danger resulting from a collission when the train was running slow than when the train was running fast. He was asked:

Q. "I will ask you whether or not running at a slower rate than 20 miles an hour, say as low as ten miles or six miles an hour, state whether or not that lessens or increases the danger of derailment when you strike a cow?"

A. Well, as a rule we have more wrecks on account of cattle where they are running slow than where they are running fast."

Q. "Why is that"?

A. Well, because where you hit stock when you are going fast they generall- knock them clear off the track."

Q. "And they do not fall back on the track and fall under the engine?"

A. "No sir."

Q. "Now I will ask you whether or not it is true that the faster you are running the more apt you are not to derail the engine if you strike an object on the track?"

A. "Yes sir."

(Record p. 29.)

This was absolutely undisputed and is manifestly true. Of
130 course the mere violation of an ordinance could in no event give a right of action unless the violation of the ordinance was the proximate and direct cause of the accident.

Unquestionably the ordinance of the town of Dayton was not passed and could not have been passed for the purpose of protecting the freight being carried by trains running through the municipality.

The courts have held that municipalities have a right to regulate the rate of speed of Inter-State trains running through their borders.

as an exercise of police power for the protection of the citizens of the municipalities.

Southern Railway vs. King, 217 U. S. 524 et seq., and cases there cited."

Unquestionably this is the only power the municipality could exercise with reference to Interstate trains, and of course the ordinance could only have been for the protection of the citizens of the town of Dayton and their property.

It is unnecessary to cite authorities to this Court to sustain the general proposition that any person for whose benefit a statute or ordinance has been passed may maintain a suit for damages resulting to him directly from a breach of such ordinance or statute. This right, however, does not extend to any other class of persons than those for whose benefit the statute was passed.

Mr. Justice Lamar stated in the case of L. & N. R. R. Co., vs. Hairston, 122 G. 373, while he was a judge of the Supreme Court of Georgia:

"The speed ordinance was passed for the protection of those of the public who were crossing the street. Its violation was not of itself an act of negligence which gave the employe riding on the engine a cause of action."

And, as stated in Thompson on Negligence, Vol. 1 Sec. 12:

"And it may be stated as a general proposition, though there may be difficulty in some cases in applying it—that the vio-
131 lation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages."

Notwithstanding the imperative language of Sub-section 4 of Section 1574 of Shannon's Code, requiring that every railroad shall keep an engineer or some other person upon the locomotive always on the lookout ahead, etc. and the express provision of Section 1575 of Shannon's Code, that every railroad that fails to observe this precaution "shall be responsible for all damage to persons or property occasioned by or resulting from any accident or collision that may occur"—still the courts have held that these provisions were intended for the protection of persons and property on the road bed in front of the engine and not for the protection of passengers or employees on the trains and that no recovery can be had for an injury resulting from a violation of these statutes to persons on the train.

Railroad Co. vs. McKenna, 75 Tenn. 313.

Railroad Co. vs. Rush, 83 Tenn. 145.

For the same reason, the violation of the rule of the company providing that trains should not run through incorporated towns at a greater speed than six miles per hour has no application to this case—first, because the violation of the rule was not the proximate cause of the accident; second, because, as before stated, the rule was not adopted for the protection of freight being carried by the rail-

way company, but for the protection of the inhibitants of the towns through which the trains run.

Again, this question cannot be looked to because no such negligence was alleged in the declaration. The specific negligence set out in the declaration, as amended, was the violation of the alleged ordinance of the town of Dayton.

132 As Congress has assumed control of the obligation and liability of carriers of Inter-State freight, there must be a uniform rule governing this obligation and liability, effective alike in all states. The states cannot be permitted to establish their own rule of liability because this would destroy the principle of uniformity essential to national control of this question. The act in this case changed the common law rule of liability of carriers of freight and established a rule that the carrier must be liable only for damage or loss "caused by it". The Statute could hardly be construed as holding that the carrier was charged with the "Highest" degree of care". The statute does not so provide and it is not susceptible of such construction.

It is, therefore, manifest that the first second, third, fourth and fifth assignments of error should be sustained.

133 *Limited Valuation Clause.*

The contract of shipment was signed both by the agent of the plaintiff in error and by D. F. Rankin, defendant in error. It was filed as Exhibit No. 1 to plaintiff's declaration. This contract was the basis of this suit. Among other provisions in the bill of lading is the following:

"That this agreement is subject to the following terms and conditions which the said shipper accepts as just and reasonable and which he admits having read and having had explained to him by the agent of the said carrier, viz:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum valuations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

Mules not exceeding $75.00.

That the tariff regulations of said carrier provide that for further increase of 100 per cent, or fraction thereof, in the above valuation, there shall be an increase of 50 per cent in the freight rate; and

That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not in any case of loss or damage to said live-stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for."

134 The act of Congress unquestionably requires all carriers to file their rates with the Interstate Commerce Commission. A heavy penalty is denounced against all carriers who fail to file their rates with the Interstate Commerce Commission or to ship at

any other rate than that provided for in their schedules filed with the Interstate Commerce Commission. It is made an offense punishable both by fine and imprisonment for either by the schedules filed by the carrier with the Interstate Commerce Commission. It is unquestionably true, when these schedules of rates have been filed with the Interstate Commerce Commission as provided by the Act of Congress that the reasonableness of the rates provided in
135 the schedules so filed can only be inquired into *the* the Interstate Commerce Commission. In every other tribunal these rates are conclusively presumed to be reasonable and valid.

In the case at bar no proof was introduced on the questions as to what rate had been filed with the Interstate Commerce Commission. The trial court held that the burden of proof was on the Railway Company to show affirmatively that it had filed this rate with the Interstate Commerce Commission The Court held, and instructed the jury, that on account of the failure to show this fact the limited valuation clause in the contract sued on was void as a matter of law.

The Court charged the jury that if they found for the defendant in error they must render a verdict for the value of the mules at the place of their destination. The Court permitted the defendants in error, over the objection of counsel for plaintiff in error, to prove the actual value of the mules at the place of their destination. The Court permitted the defendants in error to testify, over the objection of counsel for plaintiff in error, that they did not read the bill of lading at the time of the shipment and did not know its contents. In all of this we insist that the Court was in error.

The question of whether or not it will be presumed, in the absence of any evidence on the subject and where the issue is properly raised, that a railway company subject to the terms of the Act to Regulate Commerce (U. S. Comp. St. 1901, P. 3154; U. S. Comp. St. Supp. 1907, p. 892) has complied with the positive requirements of that act and filed with the Interstate Commerce Commission its schedules of rates, has, so far as we have been able to find,
136 been passed upon by only two courts in the United States, both of them being federal courts. The first is Clement v. L. & N. R. R. Co., 153 Fed. 979. This was a suit to recover damages by reason of the refusal of the railroad company to deliver three cars of lumber, which lumber the railroad company declined to delivery until certain charges demanded by it had been paid. There was a judgment for the defendant, dismissing the suit. The Court says:

"There is no allegation that the charge complained of is in violation *to* the tariff rates, which it is the duty of the defendant to submit to the Interstate Commerce Commission, and to post and act on when allowed by that body. The petition neither alleges nor denies that there was a duly filed and posted tariff of rates applicable to the freight charge herein complained of. As the defendant is, and is averred to be, engaged in interstate commerce it is the defendant's legal duty to comply with the requirements of the Interstate Commerce *Commission* Act. The petition does not suggest that

this requirement has not been complied with, and the allegation that the discrimination is against all consignees under local bills of lading and under rules of a car service association, irresistably implies that the charge complained of was made under a tariff. In the absence of a positive charge, and of even an intimation in the petition that the defendant has violated the statute, by failing to post a tariff, I am bound to presume that the defendants has done what the statute requires, and has duly filed and posted its tariff, and that the charge complained of is made thereunder."

137 The second case is that of Meeker v. Lehigh Valley R. Co. 162 Fed. 359. In this case, the Court sustained the demurrer to the bill which sought to have certain rates declared unlawful. The Court say:

"It seems to me very plain that the Congress of the United States, having full power in the premises, has established this commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the transportation of interstate commerce are legal and what are illegal; that is, what rates are proper and just and reasonable and what are improper, unjust, excessive and consequently, when so declared, illegal. It also seems clear to me that all complaining shippers are relegated to this commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness and reasonableness of the rates established, filed, published, and posted. And I think it presumed, in the absence of averments to the contrary, that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing filing, publishing and posting them."

Neither of these two cases just cited appears further in the Federal Reporter or the United States Supreme Court Reporter, and, presumably, the decisions of the courts in these cases were accepted as final.

Confessedly, there was a contract of shipment in this case, written and signed by both parties. The positive mandate of the

138 law required the Railway Company to charge, and the shipper to pay the rate which had been filed with the Interstate Commerce Commission, and the giving or acceptance of any other rate would have been a violation of the law and would have subjected both the Railway Company and the shipper to a heavy penalty.

It is also true that the failure of the Railway Company to have on file with the Interstate Commerce Commission the rate which it charged in this case would have subjected the Railway Company to a heavy penalty, and would have made any rate charged illegal.

R. R. v. Abilene Co. 204 U. S. 455, 51 L. Ed. 561;
R. R. v. Heffey, 158 U. S. 99, 39 L. Ed. 910;
R. R. v. Mugg, 202 U. S. 242, 50 L. Ed. 1012.

"It is a rule of a very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act."

Knox County v. Ninth Nat. Bank of N. Y., 147 U. S. 94, 37 L. Ed. 95.

"The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid."

1 Beach on Mod. Law of Contracts, Sec. 717.

"When a contract is valid, in the absence of existence of certain facts, but otherwise void, it is, in the absence of evidence, presumed to be valid, and the burden of proving the absence
139 or existence of such facts lies upon him who asserts its invalidity."

Greenwood on Public Policy, Rule 130, p. 118.

"The law does not presume that parties to a contract intend by it to accomplish an illegal object, but is rather presumes that they intend to accomplish a legal purpose."

2 Elliott on Contracts, Sec. 1061.

"That a business enterprise will not be undertaken until all necessary legal authority is procured * * will not be presumed or assumed"

Chamberlayne's Mod. Law of Evid. Vol. 2, Sec. 1056.

"Illegality of contract.—It is presumed that every man obeys the law, and, as a general rule, illegality, to be admissible, must be pleased. It is never presumed."

Bradner on Evidence, p. 362, Sec. 25.

"In every species of assumpsit, all matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable, in point of law, on the ground of fraud, or otherwise, shall be specially pleaded."

Chitty on Pleadings, Sec. 504.

"Illegality of consideration must be pleaded specially as a defense."

Idem, Sec. 507.

140 In McWethey v. Aurora Elec. Light Co. 202 Ill., 219, the facts were that a suit was brought to enjoin the construction of Electric Light Appliance on the streets of the city, in pursuance of an ordinance granting the authority. One objection urged was that the consent of the proper parties had not been obtained before the erection work was begun. As to this, the Court say:

"It (the consent) may be by parol or in writing, and where work is begun upon a street, the presumption would be that consent had been given by the proper authorities of the city."

"A material fact, if not alleged, is presumed not to exist."

31 Cyc. 86.

"The presumption against illegality, and its equivalent expressions that there is no presumption against legality, or in favor of

illegality, that there is a presumption in favor of legality, that facts consistent with legality are presumed to exist or that where a situation is explainable on the basis of legality it will be assumed that such is the true explanation present a rule of administration that he who claims the existence of illegality must prove it."

16 Cyc. 1082.

We wish particularly to call the attention of the court to the fact that plaintiff's declaration files as an exhibit the contract of shipment, and specifically sets out the contract limitation upon the valuation of each animal, and then attacks that clause of the contract upon five specific grounds:

141 1. It is claimed that the contract was made in Kentucky, and that the limited liability clause is invalid under the laws of Kentucky.

2. It is claimed that the limited liability clause is unreasonable.

3. It is claimed that the shippers had no option to ship by any other contract.

4. That there was no consideration to sustain the limited liability stipulation.

5. That defendant and plaintiffs were not on an equal footing, inasmuch as defendant owned the only direct line of railway and could practically dictate the terms of shipment.

Upon these grounds only plaintiff assailed the contract of limited liability.

The plaintiff did not plead that the contract was illegal for the reason that the rate charged was one condemned by law because not filed with the Interstate Commerce Commission. There was nothing in the declaration, or the contention of plaintiffs throughout the trial, to indicate that plaintiffs' objection to the validity of the contract contemplated the contention that the contract was illegal, until at the close of the case when plaintiffs made this contention. There being no plea that the contract was illegal, and, under the authorities, its legality being presumed, there was no occasion for defendant to prove affirmatively that it had taken *what* the necessary steps to make the contract legal and without which it was illegal and subjected defendant to a heavy penalty.

Plaintiffs knew what rate of freight they were called upon to pay. They agreed to pay it and signed the contract to that effect; and after attacking the contract upon the grounds set out, and only upon those grounds, they are precluded from insisting at the hearing upon the invalidity of the contract for some other reason not pleaded.

142 Plaintiff D. F. Rankin, who signed the contract, testified that he had been shipping mules from Danville for seven or eight years, and for some time had been paying the same rate as that agreed upon, towit, $95.00 per car.

Trans. p. 43.

Plaintiff D. F. Rankin testified:

"I have been shipping mules South for more than ten years, usually to Georgia."

Trans. p. 31.

He also testifies that he went to the depot at Danville, Ky. in the afternoon and signed the contract of shipment, leaving it with the agent for his father to get it the next morning, and his father did get it from the agent the next morning.

Trans. pp. 37-38.

Trans. p. 50.

The contract has plainly printed at the top in bold type: "Contract for limited liability in the transportation of live stock at reduced rates."

Under the authority of Railroad vs. Stone & Haslett, 4 Cates 367, the plaintiffs are conclusively presumed to have known and understood the terms of this contract and to have assented to its provisions, there being no claim of fraud or misrepresentation on the part of the carrier

Under the authority of the Stone & Haslett case, and other Tennessee cases, the limited valuation provided for in the contract of shipment would be held invalid were it not for the recent case of Adams Express Co. v. Croninger, Supra, in which the Supreme Court of the United States, on January 6, 1913 rendered the
143 opinion. It necessarily supersedes all State de*d*ision- on the question of the validity of limited valuation contracts for interstate shipments. That case began in the State Courts of Kentucky, and was carried by writ of error to the United States Supreme Court, the federal question involved being that the State courts had declined to sustain the validity of the limited valuation provided for in the bill of lading. Justice Lurton, in delivering the opinion of the Court, expressly holds that the Acts of Congress regulating interstate commerce supersedes all regulations and policies of every State, and that no state court can by its laws or decisions interfere with the right of the United States Supreme Court finally to construe a contract for an interstate shipment.

Defendant Railway company, in the case at bar, expressly claims and relies upon its rights under the Acts of Congress regulating interstate commerce, as construed by the United States Supreme Court in the case of Adams Express Co. vs. Croninger. The Supreme Court of the United States *hold* in this case that "the knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission. That presumption is strengthed by the fact that across the top of this bill of lading was this statement in bold type: "This company's charge is based upon the value of the property which must be declared by the shipper.'"

The Court further say, quoting from Hart v. Penn. R. R. Co. 112 U. S. 31, 28 L. Ed. 717.

"It is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be *un*held. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contract-

ing, and thus in conflict with public policy, if a shipper
144 should be allowed to reap the benefits of the contract when there is no loss, and to repudiate it in case of loss."

The Court reversed and remanded the case to the courts of Kentucky with directions to take such proceedings as woul- allow a recovery only for the limited valuation of the diamond ring involved *un* the shipment; the limited valuation being $50.00, whereas the real value was $137.52.

Under the authority of this case and the cases therein cited, we respectfully insist that if defendants in error *was* entitled to recover at all they must be limited in their recovery to the valuation provided for in the contract, towit: $75.00 for each mule, and that, in the language of the Supreme Court of the United States, they should not "be allowed to reap the benefits of the contract where there is no loss and to repudiate it in case of loss".

Plaintiffs below sued on the contract of shipment, making it a part of their declaration by exhibit, and sought to nullify certain parts of said contract for the reasons hereinbefore stated. There is not a syllable of proof in the record which tends to show any fraud in the execution of the contract or any reason why the contract as a whole should not be u*n*held except, as above stated, that the carrier has failed to show that it had complied with all the rules and regulations of the Interstate Commerce Commission in filing its rates, etc. If this contention were sound then the shipper or the carrier might nullify the law by doing something prohibited by statute, or by failing to do something required b*u* the statute. It seems that the simple statement of such an absurdity is sufficient. The rights of the parties to the contract are fixed by the Act of Congress. The parties themselves could no*t* more change their rights under said contract than they could change the law which fixes those rights.

It is therefore clear that the limited valuation clause is valid and should have been sustained, and that defendants in error are in no event entitled to recover more than the value fixed in said contract.

145 We therefore submit that Assignments of Error 6, 7, 8, 9 and 10 should be sustained and the cause either reversed or a judgment entered in this Court for the amount of the value of said animals as set out in the bill of lading.

On the whole case we submit:

(*a*) There is no liability in this case.

(*b*) If liable at all, that the plaintiff in error is only liable for the amount of the value of th*a* animals agreed upon and set out in the bill of lading.

Respectfully submitted,

PRITCHARD, ALLISON & LYNCH.

146 Filed July 8, 1913. S. E. Cleage, Clerk.

Court of Civil Appeals, Knoxville, Term 1913.

Hamilton County. Law.

C., N. O. & T. P. Ry. Co.
vs.
D. F. and T. C. Rankin.

(In Error.)

Reply Brief of D. F. and T. C. Rankin, Defendants in Error.

Facts.

We cannot accept the statement of counsel for plaintiff in error, hereinafter called the Company, as being full and correct. Some facts that we think pertinent are not stated by the company at all, and others are only partically stated, as we view it.

In connection with adverse counsel's statement and as pertinent to the assignments of error, we submit the following statement of additional facts, supported either by the uncontradicted evidence or by some material evidence—and from which this Honorable Court will indulge the view most favorable to defendants in error.

The track of the Company immediately north of the wreck, for more than a half a mile, was straight and level (R. 4, 30) the Company's train was a "Double Header" freight, drawn by two engines (R. 86), was coming south and was a half mile within the corporate limits of Dayton (R. 87) and the engineer says he had "blown a whistle" north of Fourth Avenue crossing (R. 87-8).

The Town of Dayton, Tennessee, is divided about midway by Richland Creek, running through from West to East. The northern portion of the town is divided by First, Second, Third and Fourth
147 Avenues, extending from East to West, and striking the line of the Company at right angles. At two of these Avenues, Second and Fourth, there is a crossing, each of them being a public or street crossing.

The wreck occurred about midway between Second and Fourth Avenues, or opposite the plant of the Dayton Milling Co. which adjoins defendant's right-of-way and is about 400 feet south of Fourth Avenue. (R. 84.)

Third Avenue does not cross the line of track, but only extends to the Dayton Milling Company's Plant. The distance, therefore, from Fourth to Second Avenue, along the track, is about 800 feet, and the wreck occurred about midway, or opposite the mill. (R. 92.)

Shortly south of Fourth Avenue, beginning quite a distance north of the Dayton mill and extending to Richland Creek, is a series of side-tracks, a sort of miniature railroad yard, the heart of which is crossed by Second Avenue, a much traveled thoroughfare.

The Fourth Avenue crossing was also considerably used by the public.

The Company claims the cause of the wreck was the sudden appearance on the track in front of the double-header freight of some cows, which came from behind stationary freight cars left on the side-tracks between Fourth and Second Avenues and that the Company's engineers did not see the cows in time to prevent accident or minimize results.

There is evidence tending to show a congestion of freight cars and the possibility, as the track was un-fenced, that cattle or persons might come suddenly on the track at one of the public railroad crossings at Fourth or Second Avenue, or possibly in travelling around the cars at places where they had been cut for passage at points between those crossings.

As the wreck occurred probably 400 feet north of Second
148 Avenue, it isn't claimed the cows emerged on the track from that crossing, and as we understand the theory of the Railroad Company, it is that the cows suddenly came on the track about Fourth Avenue crossing or a short distance south therefrom.

We believe the more reasonable and probably view is that the cattle either came *off* the railroad track at Fourth Avenue and turned south through the yard, or travelled southwardly along the line of the track, probably not directly on the track, for some distance, and then went on the track. There was evidence tending to show—

"a kind of a hill or bluff on the west of the railroad there".

and, by reason of the Milling Company's plant, the natural elevation and other erections, a sort of "cut" from Fourth Avenue southwardly beyond the place of the wreck. (R. 106.)

Further, that the train was "going about 40 or 45 miles an hour". (R. 105.)

The theory of the Company was that the train was travelling "18 or 20 miles an hour" (R. 89), but it seems to have been conceded by the engineer that at the rate of speed he was travelling, be it 18 or 20 or 40 or 45 miles per hour, he could not have stopped his train within less than 700 to 800 feet. (R. 95-6.)

The train consisted of 35 to 40 cars at the least. (R. 95.)

We insist there was evidence tending to show a City Ordinance prohibiting the running of an engine or train faster than 10 miles per hour through the City of Dayton (R. 29) and also prohibiting the running without continuously ringing the alarm bell over a*b*d between crossings. There is no pretense that the alarm bell was being rung.

It was conceded by the Company's e*b*gineer that at the time of the wreck there was a rule of his Company which pro-
149 hibited his running in excess of 6 miles per hour in the T*w*on of Dayton and there was also another rule requiring him to have his engine and train at all times "under control" while passing through the corporate limits, and particularly at and near street crossings. (R. 93.)

COPY BOUND TO

The engineer conceded he was violating both of these rules in running at a rate of sp*p*ed which required 700 or 800 feet for him to stop. (R. 93, 96.)

The Company's answer in the premises on this point was that the faster the train was running, the less liability of an injury or accident. The fallacy of this and the fact that there was evidence tending to prove the contrary is forcibly illustrated by the fact that both the Statutes of Tennessee and the Railroad Company's rules, as well, according to the engineer's statement, require that when anything appears on the track the emergency brakes shall be put on and every possible means employed to bring the train to a stop; wh-reas, according to the theory of the Railroad compan*u*, both the statutes and the company's rules were erroneous in this respect, and the prudent thing to do was to apply more steam, send the train forward faster, and thus minimize the pr*o*bability of injury.

The company's engineer (be it said to his credit) when pressed, couldn't sustain the position assumed by the company in this respect, below and here (R. 101-2).

In view of the errors here assigned and argued as the reason for the rules promulgated by the Railroad Company, and which were violated, we refer your honors to an admission by the Company below as to the reason of these rules, and submit that in the face of this admission of fact no argument here is needed to justify the action of the Trial Judge in refusing to exclude the engineer's statements. The engineer was asked (R. 94):

"Q. Don't you know the purpose of that rule*s* was for the
150 protection of people who might be crossing the track there, and to protect property that might be crossing the track there at that time?

"Mr. LYNCH: We admit that that is true."

It is undenied that the shippers los- 19 mules, valued at $235. to $245. each (R. 36). (We quote only one witness on that subject, but numerous others so testified, as the record shows, and the Railroad offered nothing to the contrary.)

The Company relied on the terms of a shipping contract valuing the mules at only $75. each, or from one-fourth to one-fifth their real value. A verbatim copy of this alleged contract, entitled "Contract for Limited Liability in the Transportation of Live Stock at reduced Rates" is exhibited, with a stipulation of counsel of June 23rd filed herein, and attention is invited thereto. It is conceded that one of defendants in error signed this contract under circumstances in substance these:

The shipper informed the Company's agent at Danville, Kentucky, one night that he desired to ship some stock, giving him a description thereof, from which the agent partially filled the blanks in the contract, (the forms being kept on hand by the Company) and presented same to the shipper and asked that he sign it, which was done at the ticket window and the paper immediately returned, without being read or the ter*m* thereof discussed, into the custody of the agent, who, on the following day, gave it to the father of one of the shippers. Neither of the shippers knew or ever read the terms

TO CLOSE IN CENTER

of this or a similar contract (R. 38) and neither understood he was getting a reduced freight rate by reason *if* any valuation.

In brief, the terms of the paper were not in any wise discussed, nor was the valuation of the stock. (R. 42.)

Reply to Assignments of Error.

On the facts stated in the Company's brief, either explained or modified by the preceding, we submit no error was committed to the detriment of the Company and of which it can here
151 complain. We notice its assignments in the order made.

I.

To the insistence that there is "no evidence to sustain the verdict", the answer is manifold. The company conceded (Brief p. 6) under the common law "a carrier is an insurer of the safe delivery of all freight committed to its care against loss from any cause, except that resulting from the act of God or the common enemy", and says that common rule law has been adhered to and is the law of this State unless now changed by the Interstate Commerce Act and Federal Decisions construing same. We do not claim any stronger rule against the Company at common law than conceded in the quotation above.

We deny, however, that this rule has been c-*na*ged by reason of the Carmack Ame*dn*ment to the Interstate Commerce Act as applied to the facts of this case. It is a work *to* supererogation to debate the effects of the Carmack amendment on the facts here shown, because the Company failed to offer any proof to support its numerous pleas below that it was protected against liability in excess of the $75. limit in the shipping contract, by reason of the Carmack amendment.

The Company, by various pleas, following the cases of Express Company vs. Croninger and others referred to in adverse counsel's brief, plead that it was an Interstate carrier*m* amenable to the Commerce Act, that it had complied with the ters*m* thereof, in that "it had duly filed wi*th* the Commission schedules showing its rates and charges from Danville, Kentucky, to Atlanta, Georgia, which schedules, approved by said Commission, showed the rates and charges", etc. (R. 14.)

It further plead that the shipping bill by it issued was valid, because warranted by and issued pursuant to the Company's compliance with the requirements of the Act, and that the shippers,
"Knowing this fact, declared the valuation of said horses
152 and mules to be $75. per head and thereby obtained the *cheap* cheaper rate of $95. per car. (R. 14-15.)

The Company also plead that its schedule of rates "in proper form had been filed with the Interstate Commerce Commission, as provided by law, prior to the time of these shipments", and that pursuant thereto it was warranted in issuing a limited liability contract to the shippers, and that the terms thereof were pursuant to

COPY BOUND

the authority granted by the Interstate Commission to the Company; that hence it was protected by the terms of the contract, and that the shippers "knew the freight rate was based upon the value of the horses and mules so shipped and that defendant stood ready to ship said stock at an increased valuation at an increased freight rate, and, knowing this fact, plaintiffs declared the valuation of said horses and mules to be $75. per head," etc. (R. 11-12.)

By another plea, the Company averred "it had duly filed in the office of the Commerce Commission schedules of joint rates showing charges for transportation of live stock between points on its road and connecting roads between Danville, Kentucky and Atlanta, Ga., and had printed and kept them open to the public inspection at Danville, Kentucky, such schedules, showing the rates and charges", etc. (R. 10) and that the shippers well knew these facts and that the freight rates assented to by the Interstate Commission were based on valuations; and, further, that the shipper "in order to avail himself of said minimum freight rate of $95. fixed the value of each of said mules so shipped by him at $75. and represented that this amount was the just and true value of said animals" (R. 10.)

Now, with its numerous pleas averring that the arbitrary valuation of $75. per head was valid, in the face of repeated holdings as matter of law that a valuation of one-third to one-fifth the real value was fraudulent and unconscionable, the Company offered no proof to support its pleas of compliance with the Commerce Act and
153 the consequent lawful right granted by the Commission to make this otherwise unconscionable contract.

Independent of the Act as matter of law, the contract, by reason of the arbitrary limitation value was fraudulent, and such a contract, being a mere cloak for fraud, will not be upheld. Railroad vs. Smith, 123 Tenn., 678; Railroad vs. Lockwood, 17 Wall., 379; Railway vs. Jones, 132 Ala., 437; Railroad vs. Kenner, 93 Ga., 808; Railroad vs. Stone, 112 Tenn., 376-7.

One the point that the burden of proof in this respect was on the shipper to prove a negative and show non-compliance with that provision of the Commerce Act which authorized the Company to make the contract, on the validity of which it insists? we will have more to say subsequently, because this is rai-ed by a subsequent assignment of error.

Admitting for argument here, however, that the Carmack Amendment does apply and that the Company was only chargeable with loss or damage, "caused by it", as it now contends (Brief, pp. 7-8) we respectfully insist there is the most ample evidence to sustain the verdict. Certainly, whatever loss was caused was by the Company. It is not claimed that same resulted from the act of God or the public enemy or any inherent defect in, disposition or character of the stock shipped.

Taking the most favorable view of the evidence, a double-header freight was thundering through the heart of the Town of Dayton a half mile inside the corporate limits, over public street crossings, at a rate of speed possibly as high as 45 miles per hour, and certainly

ND TO CLOSE IN CENTER

with such force as to prevent stopping under from 700 to 800 feet—the two engines drawing 45 cars.

It was passing through a congested portion of the yard along an unfenced track, with the possibility at least that stock or persons could come on the track through the yards or at the crossings suddenly, as the engineer claims in this case.

The Company's theory below apparently was justification, because the stock suddenly appeared on the track.

154 We submit, with the congested conditions shown, the duty of the Company to observe its own rules requiring it to have its train under control and to run not in excess of 6 miles per hour, was more imperative than under ordinary conditions when the cars were not in the yard and the engineer could see clearly and thus protect against a contingency which might occur at any time.

The engineer was confessedly violating the ordinances of the Town of Dayton, two rules of the Railroad Company, the Statutes of Tennessee and was guilty of the most reckless conduct—assuming there was no ordinance, statute or rule on the subject.

Any one of the acts above enumerated warranted the jury in finding negligence on the part of the Company and hence that the loss complained of was "caused by it." Railroad vs. Haynes, 112 Tenn., 420-1; Railroad vs. Snith, 123 Tenn., 678, Thompson on Neg., Vol. 5, Sections 6576, 6598, 6600-1.

Even where a risk is assumed by a servant, it is on the assumption that the other contracting party, the master, will obs-rve his own rules, and a failure to do so is actionable when the servant is injured. Thompson on Neg. Vol. 4, Sec. 4165.

By parity of reasoning when stock is received for transportation by special or general contract, it is on like assumption that the carrier will observe its own rules conducive to safe transport. And consequently a failure of the carrier to observe such rules, which produces or contributes to loss of the stock, is prima facie negligence, because it is a breach of contract.

It was admitted by the Company's counsel below that the reason for the Company's own rules, which were violated, was the protection of property and persons on the track. And it followed from this admission that there was less liability to collision with such persons or property on the track, if the Company's rules were

155 observed. And inasmuch as there is less liability to wreck where there is no collision than where there is one, it must follow that the rules were accordingly a protection to stock, or passengers being carried on the train.

The Company argues, "the only negligence alleged in the declaration is the violation of an ordinance of the Town of Dayton". This is clearly incorrect.

The first count alleged receipt of the stock, failure to deliver, and that the carrier "wrongfully and negligently" failed and refused" to deliver, and in fact "negligently wounded, maimed, bruised, etc." (R. 3-4).

The second count set forth the details of the controversy and the

COPY BOUND TO

wreck and averred the wreck occurred "because of the negligence and carelessness of defendant." (R. 6-7).

No objection was taken below for an insufficient statement, nor was a more specific one asked. A general statement, under these circumstances, is sufficient. Coal Co. vs. Daniel, 16 Pickle, 73.

The Company's criticism as to the admission of an ordinance of the City of Dayton by fair inference making it a misdemeanor to operate a train as in this case, we submit is not warranted and is hypertechnical. It is significant, however, that no mention of this ordinance is made in the charge, which contains a general and correct definition of negligence. (R. 111).

Clearly, it is incorrect, therefore, to insist, as the Company does here, that a violation of the ordinance "is the ground upon which the jury decided the case."

If the Company did not bring itself within the protection of the Interstate Commerce Act, then by its admissions it should be held as an insurer. (Brief p. 6).

If it was protected, as it claims—because the burden of proof of its non-compliance with the Commerce Act was on the shipper—and therefore it can only be held for "loss or damage caused
156 by it", still, on the uncontroverted evidence, it is liable, regardless of the Dayton ordinance. There is no evidence to the contrary.

On the statements of the engineer, the Company was guilty of the grossest negligence. So, on any aspect, it is liable.

The insistence that the more rapidly the train is running the less liability to an accident has been previously noticed, and, to say the least, is so inconsistent with common prudence, railroad rules and practices and statutory enactment that we could afford to pass it without further notice. We may add, however, that the engineer whose evidence it is claimed supports the Company's view, showed exactly the contrary on cross-examination. (R. 101-2).

The insistence of the Company that its rules and statute and ordinances, all of which were violated in this case, were in the furtherance of police power, the protection of citizens and property appearing on the tracks (as admitted below, R. 94) and afforded no right of action to the shippers, is not supported by the weight of authority, nor is it in harmony with the decisions of our Supreme Court. Railway vs. Haynes, 112 Tenn. 713.

The Company insists the Court should not have instructed the jury that defendant was held to the highest degree of care for safe transport. Loss or injury—the Commerce Act aside—"is prima facie" evidence of negligence on the part of the carrier", and a Railway company, in such a case cannot excuse itself by showing that the cars were thrown from the track by accidentally running over a man, and thereby killing horses carried by the company. (Goldey vs. Railroad, 30 Pa. 242.

To the same effect in principle are the following cases: Clarke vs. Railroad, 14 N. Y. 570; Railroad vs. Co. Reynolds, 8 Kansas, 623; Kimball vs. Railroad Co. 26 Vermont, 247; Porterfield vs. Hum-

TO CLOSE IN CENTER

phreys, 8 Hum. 497; Evans vs. Railroad, 111 Mass. 142;
157 McCoy vs. Railroad, 44 Iowa, 424.

Or, as conceded by the Company, the carrier in this State "is an insurer of the safe delivery". (Brief p. 6).

Hence, the instruction that the Company owed was highest degree of care was certainly no stronger than the duty imposed on it at common law, which was that of an insurer against loss, except the act of God, the public enemy, and, in some jurisdictions, inherent defects, disposition and characteristics.

This disposes of all assignments except those dealing with the limited liability clause of shipping contract.

II.

The Company maintains the shippers made valuations of their property "in order to avail themselves of published freight rates" set out and referred to in the shipping contract, when, in truth, such freight rate is not shown in the contract. Its absence, being the only consideration the Company maintains passed to the shipper, is remarkable. Such absence demonstrates that the minds of the parties really did not meet, they were not dealing at arm's length, they didn't negotiate in the ordinary sense, but one was absolutely at the mercy of the other and took what the other offered without reading or considering. Otherwise, how is the absence of the alleged reduced freight rate given to the shipper explained or accounted for?

As witten, the contract is lacking in mutuality, and for that reason alone is invalid. 9 Cyc. 244-5; 39 Cyc. 686; Roper vs. Stone, Cooke 497; Clarke vs. Small, 6 Yer. 423;

This is an action at law and the Company insists on the binding force of the contract, the predicate of which, as to the shipper at least is a guaranteed freight rate, which rate is left entirely blank in the contract.

158 If this contention is upheld, the contract of limited liability fails and the company is liable for the full value of the stock.

But suppose we are in error as to this. The same result follows, because the Company does not deny the contract, even by its pleadings, and certainly not by proof. True, its first plea is what might be termed a plea of not guilty in tort, but it is not defense to an action based on the contract exhibited with the complaint. Insurance Co. vs. Thornton, 97 Tenn. 11-12.

Indeed, the Company admits the contract by various pleas, and by its second denies the breach and by subsequent ones either excuses non-performance, or, admitting non-performance and liability therefor, avers the validity of the $75. valuation clause, despite the conceded fact that this sum was not one-third the real value. Such a contract is invalid as matter of law—the Interstate Commerce Act aside. Railroad vs. Stone, 112 Tenn., 364, 375-7. Railroad vs. Lockwood, 17 Wall. 379; Railroad vs. Smith, 123 Tenn. 706.

But, to avoid the force and effect of the common law rule of insurer, and as well the holding in the cases above and others that

might be cited that this valuation clause on the admitted true value was fraudulent and unenforcible, the Company set up an affirmative plea that it was an interstate carrier, had complied with requirements of the Interstate Commerce Act, filed its schedules with the commission, invoked permission of the Commission to charge a particular freight rate based on limited liability valuation, and thereby obtained a species of immunity as compared with previous liability.

By its pleadings it went further and affirmatively averred that the shippers, knowing of the facts aforesaid, designedly, knowingly and fraudulently undervalued their stock, in order to obtain the reduced freight rate and an advantageous contract which
159 the Interstate Commission had sanctioned. (R. 8-12).

After the decisions were announced by the Supreme Court of United States in the recently decided Croninger, Lata and Miller cases, the Company obtained leave to file additional pleas (R., 12-15) of the nature above and did so, thus putting itself precisely in the position of the Railroads in the Croninger and other cases above. Presumably, it supposed the shippers in present case would do as they did in the Croninger and other cases—demur to the pleas and thereby admit the truth of them. But, instead, the shippers joined issue by record entry prior to trial (R. 17) thereby clearly putting the burden of proof of compliance with the provisions of the Commerce Act upon the Company as a pre-requisite to its enjoyment of the immunity it claimed beyond the $75 valuation.

In this condition of the pleadings, the law is well settled that the burden of proof was on the Company. It does not admit of argument in Tennessee that special plea, or plea setting up an affirmative defense, imposes the burden on the party introducing such plea. Gaugh vs. Henderson, 2 Head. 629; Brown vs. Plehon, 2 Swan, 629; Carter vs. Turner, 5 Snead, 179; Douglass vs. Brandon, 6 Bax. 58; Bumpass vs. Timmo, 3 Sneed, 459.

It is not necessary to leave our own State for authorities on the point at issue. If necessary, however, we would not expect to find cases more nearly in point than those cited by the company of Clement vs. Railroad Co. 153 Federal, 979 and Meeker vs. Railroad Co. 162 Federal 359.

By fair inference, in both of these, the Courts hold the burden of proof would rest on the Railroad companies, if in the Clement case there was "a positive charge of even an intimation that the defendant has violated the Statute by failing to post a tariff"; and in the Meeker case the Court presumed "in the absence of averments to the contrary" the law had been complied with.

160 Thus, we see that if there has been an "intimation in the petition" in the one or an "averment" in the other to the contrary, most likely the burden would have been placed on the Company. Certainly, where, as here, there is an affirmative plea by the Company, the Courts in the Federal cases above would have held, as did the trial Judge, that the burden was on the Company.

Indeed, as to intra-State traffic, the limited valuation clause on the

facts of this case would clearly be invalid under the Stone & Hazlett and other cases not covered by the Commerce Act.

The Company pleads that it is relieved and immune from the stringent liability which would attach to intra-State traffic, and to support its plea avers compliance with the Interstate Commerce Act, and, further, that it had received sanction of the Commission to charge the rate and make the contract it insisted on.

When it came on the proof, as anticipated by the shippers, the Company was unable to produce evidence which its pleas contemplated, or justification for the unconscionable contract it insisted on. And as is the fate of every other litigant under like circumstances, its affirmative defense was denied.

We do not question the rules of general application touching the presumption of law copiously quoted in adverse counsel's brief. They simply have no application to the facts of this case.

While it is true, as a general proposition, that all men are presumed to observe the law and to be innocent until the contrary appears, it is equally true that when a defendant, such as this Company, claims a privilege or immunity by reason of special facts it avers, the burden of proving such special facts rests on the party so averring.

Insomuch as the Company wholly failed to prove its case, it is fruitless to discuss what might be the distinction, if any,
161 between the cases of Croninger and others above, which were decided on an admission by demurrer that the shippers had estopped themselves by their fraudulent conduct in under-valuing their property to claim in excess of the limited liability clause, and the present case, which bears no resemblance thereto.

We earnestly submit the case presents no material error against the Company and should be affirmed.

CHAS. C. FOX,
M. B. MILLER,
Attorneys.

(Copy to Adverse Counsel.)

162 Filed July 21, 1913. S. E. Cleage, Clerk. Jas. T. Joy, Deputy Clerk.

No. 3.

Hamilton County. Law.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
vs.
D. F. RANKIN et al.

Opinion.

This action involves the liability of the Railway Company for the value of a car load of mules, shipped over its lines from Danville, Kentucky to Atlanta, Georgia, on the 6th of November, 1911. The train on which the mules were being transported was wrecked at

Dayton, Tennessee, after their shipment at Danville, and this wreck was caused by the engine running over a cow on the track in front of it. There were 19 mules in the shipment, some of which were killed in the wreck, and all the others more or less damaged. The damaged mules were sold by the Company, and plaintiffs have brought this suit to recover the full value of all the mules shipped by them, as we have stated.

The declaration avers, in the first count, the delivery of the mules to the Company, which it charges was a common carrier, to be transported by it from Danville, Kentucky to Atlanta, Georgia, the plaintiffs "agreeing to pay the full freight, or tariff, charged by defendant company, for such transportation, on delivery of said mules at the point of destination." It is then averred that the company failed to deliver the mules as it was bound to do, but "wrongfully and negligently failed and refused to deliver them, and, in fact, negligently wounded, maimed, bruised and it is believed killed all or a portion of them."

The second count of the declaration, after stating the de-
163 livery of the mules to the defendant Company for transportation, as aforesaid, and the agreement of plaintiffs to pay full freight upon delivery of them at destination, it is then averred that the defendant company executed and delivered a written bill of lading, in which it acknowledged the receipt of the mules for transportation, and the agreement to deliver them to plaintiffs at Atlanta. It is then averred, in the second count, that the defendants undertook and attempted to limit its liability, in case of loss or damage to the stock, to an amount not exceeding $75.00; and it is stated that plaintiffs' attention was not called to this limitation, nor known or assented to by them; and for reasons stated, in the second count, it is averred that this limitation is void, and after making other averments in this count, not necessary to be stated, it is then said, "The car in which said mules and horses were being transported was wrecked because of the negligence and carelessness of defendant * * * near the town of Dayton, Tennessee * * * and a number of said horses and mules were killed and the remainder so badly damaged as to be almost worthless." It was averred that the mules were each worth $250.00; and the 19 mules shipped were, altogether, worth $4,750.00 and it was for this amount suit was brought.

To this declaration, the defendant filed nine pleas, the only ones of which, however, that it is material to be mentioned are the 7th, 8th and 9th, and more particularly the 8th and 9th. In these pleas it is averred, that before this shipment was made the defendant company, with its connecting carriers between Danville, Ky. and Atlanta, Ga. had agreed upon a joint schedule of freight rates between these two points, which was based upon the value of the property shipped, and that the rate of freight on a car load of mules, between these points, where the mules were valued at $75.00 each, was fixed at a certain amount that this freight rate had been filed
with and approved by the Interstate Commerce Commission,
164 and afterwards published by the defendant company, as required by the Act of Congress, creating that Commission.

It is averred that this rate provided that "when the value of said horses and mules did not exceed $75.00 each the rate was $95.00 per car; and further provided, that "for every increase of 100%, or fraction thereof in said value, there should be an increase of 50% in the freight rate." It is further averred in the 9th plea, that when this shipment was made from Danville plaintiffs knew the freight rate was based upon the value of the mules shipped by them, and that defendants stood ready to ship said stock at an increased valuation and at an increased freight rate, and, knowing this fact, they declared the value of the mules to be $75.00 each and thereby obtained the cheaper rate of $95.00 per car. It was also said in this plea, that the bill of lading mentioned in plaintiffs' declaration placed the value of the mules at $75.00 each, and this was signed by the shipper, and that it was recited in said bill of lading "that the said shipper, in order to avail himself of said published freight rates, agreed that said carrier should not, in any case of loss, or damage, to said live stock, be liable for any sum in excess of the actual value of said stock, at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is hereby stated and paid for." And it is then further averred, this provision for the limited liability of the Company is a valid and binding contract between plaintiffs and defendant when applied to an interstate shipment, and is governed by the act of Congress of February 4, 1887, amended by act of Congress June 29, 1906, and these facts are pleaded and relied upon by defendant Company as a bar to the recovery of the value of the mules killed, in excess of $75.00 each.

To these various pleas, the plaintiffs filed replication, taking issue thereon and in substance denying the truth of the aver-
165 ments set out in each of the pleas. The case went to trial before Judge Bachman and a jury, which returned a verdict in favor of plaintiffs for the sum of $4,180.00, the actual value of the mules, $328.82 interest thereon, and a total verdict for $4,508.82, on which judgment was rendered. A motion for a new trial being made and overruled, the defendant company has appealed in error to this Court, and insists upon a reversal of the judgment against it upon a number of grounds set out in the assignments.

It is first insisted, that there is no evidence to support the verdict of the jury, and, in this connection, we will state that there were but two questions of fact submitted by the trial judge to the jury; the first being whether, or not, the loss sustained by plaintiffs was caused by the negligence of the defendant company; and the second, the actual value of the mules killed and injured at the place of destination: There *is* no exceptions to this action of the trial judge, nor did defendant below ask for any fuller or more extensive, charge than he delivered to the jury, which, in fact, was exceedingly brief, but according to his view of the case, covered the only points to be passed upon by a jury. In view of the assignment, that there is no evidence to sustain the verdict of the jury, it becomes necessary that we review the testimony, as shown in the record.

It appears that, on the 6th of March, 1911, one of the plaintiffs loaded these mules in a car furnished by defendant company, for shipment to Atlanta, Georgia. After doing so, he went to the freight office to get a bill of lading for them. It was filled out by a clerk in the office under the supervision and direction of the agent of defendant company. There is no amount to be paid by the shipper as freight for the transportation of the mules to Atlanta stated in the bill of lading. It was signed by the agent after it was filled out and also by this one of the plaintiffs. Neither the agent nor his
166 clerk saw the mules at any *at any* time before the bill of lading was signed, or afterwards, so far as this record shows. Nothing was mentioned about the value of any one of the mules, or all of them, by either the agent or the shipper. After the agent signed the bill of lading, he delivered it to this one of the shippers for his signature. He signed it but did not read it and, in fact, never read it, but returned it to the agent with directions for him to deliver it to his father, who would call for it the next morning, as his father was going to Atlanta to look after the mules upon their arrival at that point. His father, the other plaintiff, did call for the bill of lading, when it was delivered to him by the agent, and he folded and placed it in his pocket, and himself never read it nor knew its contents. The train in which the car carrying these mules were loaded, as stated in the declaration, collided with a cow, at Dayton, in this state, on the morning of the 6th or 7th of November, about 10 or 11 o'clock. The Railroad runs north and south, as it approaches and passes through this town, and crosses several streets, towit; 1st, 2nd and 4th avenues on the north section of the town of Dayton, 4th avenue being the one nearest the north corporate limits of Dayton. At this point the road is straight for a mile from 2nd avenue. The depot is on the east side of the track and north of 2nd avenue, and south of 3rd avenue, which extends from the east, west to the railroad track, but no further. The train was derailed and the engine and a large number of cars, including the one in which these mules were being carried, were thrown from the track just east of the depot, or rather its northwest corner. The distance between this avenue, as the proof shows, is about 400 feet, and at this particular time, there were a large number of box freight cars standing on the side track, east of the main line, north and south of the depot, and, as we understand the record, at the point where 3rd Avenue approaches these side tracks and main line, there was a way
167 open between these cars for travellers to pass, and when the front engine, there being two of them pulling this train, reached a point some four hundred or five hundred feet north of where it was derailed, as stated by the plaintiffs' witness on rebuttal, the engineer in charge of this particular engine saw a cow, or cows, come out from behind the cars, which were parked on the switch track, and start to walk across the main line. The engineer put on his emergency brake, and according to his own testimony, this was the only effort to slacken the speed of his train, which was then running, according to his testimony, 18 or 20 miles an hour, and according to the testimony of plaintiffs' witness 40 or 45 miles an hour, and we must take the latter as being the speed of the train,

as the jury has settled that question. There were 45 cars in this train, and after putting on the emergency brake and running the distance of at least 400 Feet, as stated by plaintiffs' witness, the engine struck one of these cows and after running some distance was derailed and nearly all of the train was thrown from the track, including the car in which these mules were being transported.

Appellant's learned counsel insists that this was an unavoidable accident, for which it was in no way liable to any one for the loss or damage sustained to stock, or other property on this train. The plaintiff below undertook to prove that there was a valid ordinance in force, passed by the mayor and aldermen of the town of Dayton, prohibiting the running of trains at a greater rate of speed while passing through that town than ten miles an hour; and it was also shown in proof, that there was a rule of the Company prohibiting engineers from running their trains through incorporated towns at a greater rate of speed than 6 miles an hour.

It is insisted that the court erred in permitting evidence of these rules and ordinances to go to the jury for reasons which we will mention later.

The plaintiff's learned counsel insist, that the violation
168 of these rules and these ordinances was only evidence of negligence on the part of those in charge of defendant's train, and it is argued that, as the declaration only charges general negligence, which is sufficient under the case decided in 100 Tenn. 73, that they had the right to prove any acts of negligence which sustained this general averment. It is further contended, by their learned counsel, that the burden of proof to show the exercise of due care and caution to avoid liability for an accident is upon defendants; that where stock, or other freight, is delivered to a common carrier, the common law rule, which has been in force in this State for a great many years, makes the carrier an insurer of the safe delivery of all freight committed to its care, and against the loss from any cause, except such as result from the act of God, or the common enemy. There is no doubt but such is the well settled rule in Tennessee, and has been for a great many years, unless it has been abrogated by the Act of Congress, relied upon in defendant's plea. Such is still the rule in this state in reference to intra-state shipments of freight, but, as this was a shipment through Tennessee to a point in Georgia, it is insisted by appellant's learned counsel that the old common law rule is abrogated, in so far as it applies to interstate shipments of freight, by the act of Congress in question. Whether this act of Congress controls in this case will be determined by us in a subsequent part of this opinion.

It has been held that negligence will be presumed from the falling of a guy wire dangerously charged with electricity 2 Cates 280); that it will be presumed from the fact that a horse attached to a buggy in running away, 1 Cates 59; and it has been frequently held, in this State, and, indeed, the rule seems well settled, that negligence is presumed from injury to passengers on a car from its derailment, or collision, with another train.

169 It was held by the Supreme Court of Pennsylvania, in Goldey vs. Railway, 30 Penn. 242, that loss or injury in a case like this is prima facie evidence of negligence on the part of the carrier, and that a railroad company in such case cannot excuse itself by showing that the cars were thrown from the track because the engine accidentally ran over an obstruction on the track, which resulted in derailment of the train thereby killing and injuring horses carried by the Company. Of course these authorities proceed upon the theory, that the case is not controlled by the act of Congress and, at present, we are dealing with this case upon the idea that the act of Congress is not controlling or has no bearing upon the companie's liability in this case. It has been often held, a carrier is liable for the safe delivery of freight delivered to it for transportation in all cases, except for the act of God, or public enemy, and then it necessarily follows that the Company in this case is liable for the loss of these mules, unless excused by the act of Congress from such liability, 112 Tenn. 370.

We are of the opinion that the jury was well warranted in finding the issue of negligence against the contention of the Company. This train was being operated at a high rate of speed through a thickly populated town, pulling 40 or 45 cars, and in direct violation of the rules of the Company and the ordinance of the city. But one effort was made to lessen its speed, and that was to put on emergency brakes. There can be — doubt and, in fact, it does not seem debatable, that had this train been running through Dayton at a speed of six to ten miles an hour, then when the cows appeared upon the track in front of the engine, the engineer in charge thereof would have been able to so control it as to permit these animals to pass safely over the track, and, thereby, avoid a collision with them. It is not certain that the Company was free from negligence in having its cars so parked, as was done at the time on the
170 switch tracks, as to prevent the engineer seeing cattle approaching the track in front of the moving engine. Upon all the facts of this case, as developed in the trial below, and they are not many, we are of the opinion that the jury was well warranted in finding that this loss, or injury, to this stock was, in the language of the "Carmack Amendment" to the Interstate Commerce Act, "caused by" the defendant company, that is; by its negligent default, and for these reasons it is liable therefor to the extent of the $75.00 valuation placed upon the mules in the bill of lading, and for these reasons, the first assignment that there is no evidence to support the verdict is overruled.

It is insisted that the trial judge was in error in permitting the plaintiffs to prove, in the lower court, the alleged ordinance, copied into the record, upon the ground that it was not shown to have been passed by the board of mayor and aldermen of Dayton, nor published in accordance with the requirements of its charter. And, again, it is insisted that it was error to allow this ordinance to go to the jury, because it has no meaning as it appears in this transcript, and does not in fact prohibit the running of trains faster than ten miles an hour, and might just as well be construed to be a permission to run at that rate as a prohibition. We cannot

agree with counsel in this insistence, for we think the adoption of the ordinance was proved about as well as ordinances usually are in such cases, and it does not appear that its validity depended upon its publication, nor that it was not to take effect until published, and for these reasons this objection is not sustained.

The criticism on the ordinance, as copied in the record, that it is meaningless is not in our judgment well sustained. It is in the following language; "Section 39; To run or cause to be run in the city any railroad engine, train or car faster than at a rate of ten miles per hour; or to run same over any street, or crossing
171 within the city, without continuously ringing the alarm bell during the progress over and between said crossing." This is the language of the ordinance criticised as meaningless, and counsel say it may be a prohibition, or it may be a permission, to railroad companies to run their engines and trains at that rate of speed. In construing an ordinance, like an act of the legislature, we are bound to place that construction upon it that gives to it an intelligent meaning, as well as some force and effect, and to hold it a valid ordinance rather than an invalid one. This appears to be section 39 of the ordinance adopted by the city of Dayton, and "evidently, some section preceded it which decares a violation of this one a misdemeanor, and forbids the running of trains or engines at a greater rate of speed than is designated in the ordinance. If this is not true, then the ordinance in question is meaningless, but presuming, as we think we must do, that there is a preceding section which forbids the running of trains and cars faster than 10 miles an hour, and making it a misdemeanor to do so, then, with this presumption, the ordinance in question is not meaningless nor invalid, and for this reason we overrule this assignment. 101 Tenn. 273; 116 Tenn. 736; 117 Tenn. 381.

Again, it is insisted the court was in error in allowing plaintiff to prove, during the trial, that the rules of the Company prohibited engineers to run trains through corporated towns at a greater rate of speed than six miles an hour, because there was no averment of these rules in the declaration. It was not necessary that plaintiff allege the existence of such rules and their violation in order to make such evidence competent. The declaration avers negligence generally and defendant seems to have been satisfied with that charge in the declaration, and it was competent for the plaintiff, under this averment, to prove any act of negligence by the employees of the company, including the existence and violation of its rules regulating the speed of its trains in corporated towns,
172 and for this reason we do not think the court was in error in permitting this proof to go to the jury.

It is next insisted that the court erred in a certain paragraph of his charge to the jury, to wit: "Gentlemen of the jury, negligence is the want or lack of exercise of that degree of care which the peculiar circumstance demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals." While this is, perhaps not the exact verbiage his honor should have used, it was evidently stated in an off hand way, without much, if any thought, and in response to a request verbally made to him

by one of the plaintiff's counsel. It is not such an error, if error it be, and we are not prepared to admit that it is, as effected the verdict in this case, or resulted in an injury to the defendant below. The particular part of the charge is that in which the court says "the carrier held to the highest degree of care for the safe transportation of the animals," counsel insisting that this rule applies only to the carriage of passengers. Strictly speaking, it may be true that the rule stated by the learned judge does not apply to mules, but only to passengers, and yet, the rule as stated by his honor is no stronger than the common law, which makes the company liable for the safe transportation of mules, or other freight, unless prevented from doing so by the act of God, or the public enemy." The common law rule, which holds common carriers liable as insurers of the safe transportation of freight, is certainly as strong as the rule stated by the trial judge, and for these reasons we are not able to see wherein this error was harmful to the defendant, if it was error at all, and we do not hold that it was. It follows that this assignment is overruled.

The 6th, 7th, 8th, 9th and 10th assignments will be considered together, as they all substantially bear upon the same ques-
173 tion. The chief question in these assignments is, on which party rests the burden of proof as to defendants' compliance with the Act of Congress, requiring it to file its schedule of rates with the Interstate Commerce Commission for its approval, etc. This appears to be the battle ground in the briefs filed by counsel for both parties, and was most probably the storm center around which the fight was waged in the lower court. There was no proof offered, in the lower court, showing the Company had agreed on a schedule of freight rates, filed with the Interstate Commerce Commission, that the same had been approved by it and published by the Company, and it insists, in the absence of any proof showing its compliance with the act of Congress, it is presumed to have done as this act requires it to do, while "the plaintiffs, with much force and ability, insist, that inasmuch as the defendant, in some of its pleas, averred it had performed these requisites, which averments plaintiffs denied, that the burden of proof was on the Company to sustain these averments, and there being no proof that it had complied with the act of Congress in these respects that its limited liability contract was a nullity. It is a familiar rule of procedure, and one long settled, that a party to a suit, averring an affirmative fact, has the burden of proof upon him to sustain it. If the plaintiff avers a fact in his declaration, which is denied in the plea, the rules require him to sustain, by proof, his affirmation. If the defendant sets up an affirmative defense, which, if true, is a bar to the plaintiff's action, the burden of proof is upon him, or it, to sustain such defense." 2 Head, 629; 2 Swan, 629; 5 Sneed, 179; 3 Sneed, 459; 6 Baxter 58.

174 In the case of Carey-Lombard Lumber Company vs. Thomas, reported in 8 Pick. 594, it was held by the Supreme Court in this State, that a foreign corporation, whose charter had not been registered, as required by the acts of 1891, ch. 122, could not maintain a suit to recover a debt from the defendant. In that case,

there being no proof in the record that the Company had filed its charter for registration, according to the provisions of the act, it sought to rely upon the presumption that it had done so, btu the Supreme Court, speaking through Mr. Justice Wilkes, held that that was not sufficient, and "in order to entitle the complainant to any relief it must show, affirmatively, that it had complied with the law; until that it done, all its transaction- are illegal. The burden of proof being upon it, the Court can oresume nothing in its favor, and can only hold such of its contracts enforceable as it shows were made after it had complied with the law, enabling it to make a valid contract and to transact business."

The direct question arose in the case of Railroad vs. Horn, 2 Pick. 73, and grew out of the following facts: Freight had been shipped from Peoria, Ill., to Horn, at Knoxville, Tennessee. A bill of lading had been issued by the initial carrier to plaintiff for this freight, in which a rate of 51½ cents per hundred pounds was stated on 2235 lbs., the actual weight of the entire shipment. When the goods reached their destination at Knoxville, the consignee tendered to the terminal carrier a freight charhe according to the bill of lading. This company refused to receive this amount and declined to deliver the goods, but demanded a rate charge of 99 cts. per one hundred lbs., actual weight. The consignee, declining to pay this additional charge, brought this action of replevin
175 to recover possession of the goods. Mr. Justice Wilkes said, in the course of his opinion, "the rate of affreightment inserted in the bill of lading, is ordinarily binding on the parties and will be effectuated bu the courts as an agreed compensation for the services contemplated * * * and such rule controls the case, unless the Federal law invoked by the company creates an exception within which it falls. The company insisted that under the Interstate Commerce Act it was required to furnish the Commission, for its approval, a copy of its schedule of rates and thereafter to print and publicly post tham at each station upon its line." Mr. Justice Wilkes said, there being no proof in the case that the act of Congress had been complies with, "if the contest be with respect to the shipment over a single line, the carrier to have the benefit of the act against its patrons must show publication at each of its stations; and if it be as to a transportation over connecting lines, on joint account, they must show they have made such publication as the Commission directed, or the act will not be applied in their favor." He then held that courts would presume the Interstate Commerce Commission had required the publication of the schedule rates, and as the record in that case offered no evidence that such direction was not given, the presumption that it was became conclusihe for the purposes of that case, and the defense of the railroad company must fail, because it did not prove compliance with that direction. Mr. Justice Wilkes says: "Some publication is presumed to have been directed, but none is shown to have been made. This excludes the case from the operations of tl e Federal statute, and leaves the plaintiff with his rights under the bill of lading unimpaired and enforcible in this suit. It may be that this company and its associates have subjected themselves to the penalty of that law.

Whether they have or not, *and* it is not the province of this court to decide. It is certain they have failed to established compli-
176 ance with one of the preliminaries necessary to put it in operation as to plaintiff. It may well be enforced as to them in many of its requirements and not as to him in any particular." It seems to us that this opinion of Mr. Justice Wilkes is conclusive of this question and fixes the burden of proof upon the defendant company to show that it has filed its schedule of rates with the Commission; that the Commission has approved them, directed their publication, and that the company has complied with such directions, and having failed to make this proof according to the burden resting upon it, it cannot rely upon the presumption, insisted by its learned counsel, that it has complied with the law.

We do not think the cases cited by learned counsel, towit; Clements vs. L. — N. R. R. Co. reported in 153 Fed. Rep. 980, and the case of Meeker vs. Lehigh Valley Railway Co., reported in 162 Fed. Rep. 354, sustains learned counsel's contention. In the case of Clement vs. R. R. Company, *supra*, the district judge Sammons only held that "in the absence of a positive charge, or even of an intimation, in the petition, that the defendant has violated a statute by failing to post his tariff, he was bound to presume it had done what the statute requires." And this clearly indicates that the court would have held that, where a charge, or even an intimation, was made that the railroad company had not complied with the statute, no such presumption arose. In Meeker vs. Railway Co. *supra*, Mr. Justice Ray, speaking to this question said: "It is presumed in the absence of an averment to the contrary that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing and publishing them," and this shows that the learned Justice would hold, where it was denied that these requirements were performed, no such presumption would exist, but the burden would be upon the company to show that they had done what the law required they should do.

We have, upon these authorities, no hesitancy in reaching the conclusion and, in fact, it hardly appears debatable to us,
177 that it was incumbent upon the Railroad Company, in this case, in the present state of the pleadings, to show by proof that it had met the requirements of the Interstate Commerce Act, and this burden it failed to carry, and having failed to do so it cannot rely upon presumption.

Having reached this conclusion, it remains to be determined what are the rights and liabilities of these parties, under the contract of carriage in this case. There being nothing in the record to show that the rate of freight charged by the Company was approved and authorized by the Interstate Commerce Commission, we must determine the rights of these parties upon the theory that no such rate was ever filed with the Commission, or approved or authorized by it, and that the rate and contract made in this case was without the authority and outside of the act of Congress, invoked by this defendant; or, in other words, so far as the Interstate Commerce act is concerned, this Railroad Company has made the contract in violation of its provisions, and, having done so, we do not think the

opinion of Mr. Justice Lurton, for the Supreme Court of the United States, delivered January 6th, 1913, in the case of Adams Express Company vs. E. H. Cronnger, is controlling. Having failed to file its schedule of rates with the Commission, as required by law, it follows that it had no right to make the contract limiting its liability, and that the right of the parties thereto is governed by the common law. As we understand Mr. Justice's opinion, the right of a common carrier to limit its liability for the value of a shipment is dependent upon the compliance by such carrier with the requirements of the Interstate Commerce Acts and its amendments, and if it has not done this, even if it be an interstate shipment, it has no right to limit its liability for the value of freight carried by it, unless the value fixed in its contract of shipment be "fair, open, just and reasonable," using the language of Mr. Justice Lurton in the opinion cited.

178 In this case there is no proof that the Railroad Company had any other rate than than the one charged plaintiffs for this shipment between Danville, Ky. and Atlanta, Georgia. There is not proof that it offered to Plaintiffs, at the time it issued to them its bill of lading, a contract with an unlimited liability or, in other words, a common law liability. Indeed, the rate of freight charged in this case is only inferable from some of the statements made by the plaintiffs, to the effect that they paid $95.00 per car for shipments from Danville, but they do not state to what points such shipments were made, nor on what valuation such rates were based, and, hence, we say the rate charged in this case, while the proof does not show what it was, is a mere inference, or a presumption, that it was $95.00 a car, on a valuation of $75.00 for each mule shipped.

The Supreme Court of Tennessee has held in several cases, that if the contract of limited liability "be fairly obtained, just and reasonable, and upon sufficient consideration, and the carrier at the time the contract was made, was ready and willing to transport the freight with, or without, such limitation such contract would then, in that case, be valid and binding upon the shipper"; no matter whether he read it or not, or knew its contents. 112 Tenn. 348; 123 Tenn. 678. That Court has, however, held that where the valuation *is* placed on stock, in the bill of lading is not more than half, or one-third, its value, that such contracts are unreasonable, unfair and unjust and void.

In this case the valuation placed in the bill of lading is $75.00 for each mule, while the proof overwhelmingly shows that the mules in question were worth upon an average of $225 each, being three times the value fixed in the bill of landing, and for that reason the trial judge held that the contract of limitation on the liability of the Company was unfair, unjust, unreasonable and void, and on this view of that question this court fully concurs. The records shows,

179 without controversy, that there was no pretense at the time the contract was made of fixing a value upon these mules. The agents of the company did not see them nor undertake to put a value on any of them. The agent simply presented to the shipper a contract, in which $75.00 value for each mule was inserted,

signed by the agent, and which was signed by the shipper. If the company had any other rate than the one it agreed for the transportation of this freight, it did not disclose that fact to the shipper, nor did it have any rate whatever posted in, or about, its office. If it had a shipping contract with unlimited liability it did not choose between the two, and, from the undisputed facts developed in this record, it is clear to our minds this contract is void and the limited liability clause therein cannot be relied upon by the company as a bar to the recovery of full value of each animal shipped. If, however, the defendant had shown, by proof, that the rate charge by it for this freight had been filed with and approved by the Interstate Commerce Commission, and that it had posted the *freight* as required by the act of Congress, then a rate of freight based upon the valuation fixed in the bill of lading would have limited plaintiffs' right to recover to the value fixed in the contract. To hold otherwise would be unjust to the carrier, for, in such case, the shipper would get advantage of a reduced rate of freight based on the value fixed in his contract, and, of course, should be held to that value in a suit to recover loss, or damage, to the freight shipped under such contract. But we have no such case before us, but simply a case where the company according to the proof in this record, without consulting the plaintiffs, and without seeing the animals, fixed a value on the stock and charged just such rate of freight based upon that value as it sees fit. And, in a case of that character, the
contract of shipment is governed by the common law and not
180 by the Interstate Commerce Act.

It results from these conclusions that assignments 6, 7, 8, 9, and 10 are not sustained and that we find no error in this record, and the judgment of the lower court is affirmed, with costs.

MOORE, *Judge*.

181 Court of Civil Appeals of Tennessee, at Knoxville, Saturday, July 19, 1913, May Term, 1913.

Court met pursuant to adjournment present and presiding the Hon. S. F. Wilson, H. Y. Hughes, and Felix W. Moore. The minutes of Saturday July 12, were read and signed when the following proceedings were had, to-wit:

No. 4.

Entered July 19, 1913. Affirmed.

C., N. O. & T. P. Ry. Co.
vs.
D. F. Rankin and T. C. Rankin.

This case came on to be heard on the transcript of the record from the Circuit Court of Hamilton County, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion and so orders and adjudges that there is no reversible error in the judgment of the Court below, and for the reason stated in the written

opinion of the Court filed and made a part of the record in this cause; the assignments of error are all overruled and the judgment of the Circuit Court affirmed.

It is accordingly ordered and adjudged by the Court that the defendants in error have and recover of the plaintiff in error the sum of Four Thousand five hundred eight dollars and eight--two cents ($4508.82), and all the cost of the case; and that they also have and recover of the plaintiff in error and M. M. Allison and J. J. Lynch its sureties on the appeal bond the further sum of one hundred five dollars and fifty-three cents ($105.53) damages, said amount being the interest on the above recovery from the date of the judgment in the Court below, to-wit, March 1, 1913, to this date July 21, 1913, together with all the cost of the appeal, for all of which execution is awarded.

On motion of W. B. Miller attorney for defendants in error a lien on the above recovery for their reasonable attorney's fee is hereby declared and allowed.

182 CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

D. F. RANKIN and T. C. RANKIN, Defendants in Error.

To W. B. Miller, attorney for Defendants in Error:

Take notice: That we will file, and on Tuesday, September 2nd, present to the Supreme Court sitting at Knoxville, Tennessee, a petition for certiorari in this cause, accompanied by assignments of error and brief in support of same; and will at that time present to said Court a motion to permit oral argument in said cause, and ask that this cause be set down for oral argument at such time as may suit the convenience of said Court.

This August 28, 1913.

PRITCHARD, ALLISON & LYNCH,
Attys. for Plaintiff in Error.

I acknowledge receipt of copy of above notice August 28, 1913.

M. B. MILLER.

183 No. 5.

Filed September 1, 1913. S. E. Cleage, Clerk.

In the Supreme Court of Tennessee, at Knoxville.
Hamilton County Law.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
D. F. RANKIN et al., Defendants in Error.

Petition for Certiorari and Supersedeas of Cincinnati, New Orleans & Texas Pacific Railway Company.

May it please the Honorable Supreme Court of Tennessee:

I.

Your petitioner respectfully represents that it is aggrieved by the judgment of the Court of Civil Appeals rendered in the above styled case, upon an opinion filed July 21st, 1913, wherein the said Court affirmed the judgment of the Circuit Court of Hamilton County, Tennessee, against your petitioner, in the sum of $4750.00.

The facts are that petitioner, Railway Company, made a written contract with the defendants in error for the shipment of nineteen mules from Danville, Ky., to Atlanta, Ga., the contract
184 being the usual live stock bill of lading, and being exhibited with the declaration. Confessedly, the shipment was interstate.

While the freight train upon which said mules were being transported, was passing through the town of Dayton, Tennessee, a cow suddenly appeared upon the track in front of the engine, and caused the derailment of said train and the death and serious injury of a number of said mules.

The verdict of the jury was for the full value of the mules killed and injured, upon which verdict the Circuit judge rendered the judgment which was affirmed by the Court of Civil Appeals. The facts are fully set out in the accompanying assignment of errors and brief.

Your petitioner respectfully represents that the Court of Civil Appeals, as well as the trial judge, was in error in rendering any judgment against it, for the reason that there is no evidence whatever to justify such a judgment under the present state of the law.

What is known as the "Carmack amendment to the Interstate Commerce Act," passed on June 29th, 1906, provides that a common carrier shall issue a receipt, or bill of lading, when receiving property for transportation from one state to another, and shall be liable for any loss or damage to such property "caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, etc."

In Adams Express Co. v. Croninger (Advance sheets, Vol. 33, No. 6, p. 129-219) the Supreme Court of the United States expressly holds, that inasmuch as Congress has by this Interstate Commerce Act legislated upon this subject, the rules and policies of every State on the question are necessarily superseded; and that in so far as an interstate shipment is involved, the Federal law alone gives the shipper or the carrier rights and remedies. This being true,
185 it necessarily follows that the liability of petitioner must be determined with reference to the duties imposed by the Carmack amendment, and not otherwise. The Carmack amendment, as construed by the Supreme Court of the United States, having limited the liability of a common carrier, under circumstances similar to those in this case, to loss or damage caused by the common carrier, or the connecting carrier, the rule of the common law that the carrier is an insurer is, to that extent, necessarily abrogated.

It will be shown in the accompanying brief that the derailment which caused the injury to the mules was a pure accident, and could not in any sense be said to have been caused by the Railway.

The plaintiffs below filed two counts to their declaration, and later amended both counts. The original counts merely charged the Railway with negligence, without specifying any negligence. The amendment, which was incorporated into each count, specifically charged the Railway with having violated an ordinance of the town of Dayton, and this is the only specific negligence anywhere charged against the Railway by the plaintiffs below.

As will be hereinafter shown, the alleged ordinance of Dayton introduced by plaintiffs below is not proved as an ordinance; and even if it were, it is absolutely meaningless. The alleged ordinance introduced does not prohibit anything or penalize any act. The Court of Civil Appeals, in effect, held that the so-called ordinance is meaningless, but presumed that there was some preceding ordinance which would give validity to this alleged ordinance, complete in itself, which plaintiffs below introduced and relied upon.

The trial judge, over the objection of petitioner, permitted proof to go to the jury that the engineer of the Railway Company was violating the rules of the company at the time of the collision with the cow, although nowhere in the pleadings had any mention
186 been made of the company's rules.

It is, further true, as will be shown in the accompanying brief, by the undisputed proof, that even if the speed at which the train was running at the time of the collision was such as to be in violation of an ordinance of the town of Dayton and of the rules of the Railwat Comapny, such violation is not shown to have been even a contributing cause, much less the proximate cause of the accident.

Your petitioner, therefore, respectfully represents that the evidence in this case does not justify any judgment against it at all.

II.

If, however, for any reason your petitioner is liable for anything, then your petitioner respectfully insists that the limit of its liability is $75.00 per mule rather than the full value.

The Circuit Judge and the Court of Civil Appeals, while necessarily (by reason of the decision of the United States Supreme Court in the case of Adams v. Croninger, supra) conceding that petitioner's liability would be limited to the agreed valuation of $75. stipulated in the bill of lading, if the bill of lading was a valid contract, — both held that the stipulation in the bill of lading cannot be relied upon by your petitioner for the reason that your petitioner did not affirmatively prove that the rate of freight charged by it for the shipment was one which had been filed with the Interstate Commerce Commission.

In their declaration, plaintiffs below allege several reasons why the contract limitation of $75.00 should be held invalid but nowhere do they plead or reply upon any failure (if there was such failure) of the Railway Company to file its freight rate with the Interstate Commerce Commission. Under the authorities cited in the accompanying brief, your petitioner respectfully represents that,
187 in the absence of any proof on the subject, it will be presumed that this rate was filed with the Interstate Commerce Commission. But, even if the rate were not filed, and independently of any question of the filing or non-filing of the rate, Congress, in the act to regulate commerce, has spoken upon the subject upon which it has exclusive right to speak, and has by this means abrogated the rule of every State which in any way conflicts with the decisions of the Federal Courts upon this federal question of interstate commerce.

Beginning with the leading case of Hart v. Pennsylvania Ry. Co., 112 U. S. p. 331, on down to the Adams v. Croninger case, supra, the United States Supreme Court held that the valuation agreed to by the carrier and the shipper at the time of the shipment fix the rights of the parties on the question of the value, and fix the limit of the shipper's remedy, in the event of loss or damage.

Long before the Carmack amendment, interstate carriers were required to file their rates with the Interstate Commerce Commission, under a heavy penalty for refusal. Until the passage of the Carmack amendment, the various states were permitted to adopt their own rules and policies with reference to the construction of interstate shipment contracts; but when Congress, exercising its unquestioned right, passed this Carmack amendment in 1906 and thereby took exclusive jurisdiction of the question, it superseded all such State rules and regulations. The Carmack amendment requires the issuance of a receipt or bill of lading, and makes the carrier or any connecting carrier liable for any loss or damage or injury caused by it. This is a liability created for the first time by this act, and one which does not in any way depend upon whether the carrier has or has not filed its rates with the Interstate Commerce Commission. When the shipment has been received by the carrier and the bill of lading issued therefor, the responsibility attaches. The question in such cases is no longer one to be controlled by State laws, rules or policies, but has for all time henceforth become a federal question to be governed by the rules,
188 policies and decisions of the Federal Courts.

The filing or not filing, of the schedule of rates has no

effect one way or the other upon the rights and remedies of the parties to the contract and hence the Circuit Judge and the Court of Civil Appeals were clearly in error in holding that the Railway Company cannot take advantage of the specific contract which it made with the shippers, in the absence of evidence showing that the rate of freight charged had been filed with the Interstate Commerce Commission. The filing of the rate with the Interstate Commerce Commission was not a*m* condition precedent to the application of the Carmack amendment to an interstate shipment, and the failure to file such schedules cannot entitle plaintiffs below to abrogate the contract they made any more tha*h* the railway company could have—for instance, if the damage had occurred on some connecting carrier and the railway company had then sought to escape liability imposed by the Carmack amendment on the ground that this rate had not been filed with the Interstate Commerce Commission.

Wherefore, your petitioner respectfully prays that certiorari and supersedeas issue to the Court of Civil Appeals, and that this case be reviewed in the Court and dismissed; or, if this Court is of opinion that plaintiffs below are entitled to any recovery, that recovery be by this Court limited to the agreed valuation of $75.00 for each mule.

This is the first application for certiorari and supersedeas made in this cause, and is filed within the time allowed by the rules of this Court, after first giving the notice required by the rules of this Court.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By Attys., PRITCHARD, ALLISON & LYNCH.

STATE OF TENNESSEE,
Hamilton County:

J. J. Lynch makes oath in due form of law, that he is agent and attorney for the petitioner, Cincinnati, New Orleans & Texas
189 Pacific Railway Co., and that the statements of the foregoing petition are true to the best of his knowledge and belief.

J. J. LYNCH.

Sworn to and subscribed before me this 29 day of August, 1913.

J. G. PHILLIPS,
Notary Public.

To the Clerk of the Supreme Court, Knoxville, Tenn.:

Issue writs of Certiorari and Supersedeas as prayed in the Petition upon bond for Supersedeas being given in the sum of $500.00.
This September 2*n*, 1913.

S. H. WILLIAMS, *Judge.*

No. 6.

Certiorari.

190 STATE OF TENNESSEE,
Supreme Court at Knoxville:

To S. E. Cleage, Clerk of the Court of Civil Appeals, at Knoxville:

Whereas, in the case of C. N. O. & T. P. Ry. Co., plaintiff, vs. D. F. Rankin, et al., defendant-, said Court of Civil Appeals, rendered a Judgment on the 21st day of July, 1913, in favor of the defendants and against the Plaintiffs and the plaintiffs has obtained a fiat for the writ of Certiorari to bring said cause into the Supreme Court at Knoxville to be retried.

Now therefore, you are hereby commanded to send the transcript of the record and all other papers in said cause, duly enclosed and certified to by you to the Supreme Court to be held at Knoxville on the second Monday in September, 191— to the end that such further proceedings may be had thereon, as to the Court may seem reasonable and proper.

Witness my hand this 2nd day of September, 1913.

S. E. CLEAGE,
Clerk Supreme Court of Tennessee, at Knoxville.

Filed September 2nd, 1913, S. E. Cleage, Clerk.

No. 7.

191 *Bond for Writ of Certiorari and Supersedeas.*

STATE OF TENNESSEE,
Supreme Court, Knoxville:

Know All Men by These Presents,

That we, Cincinnati, New Orleans & Texas Pacific Ry. Co., and Pritchard, Allison and Lynch, are held and firmly bound unto D. F. Rankin, et al., the penal sum of Five Hundred Dollars.

The condition of the above obligation is such that, Whereas, in the — Court of — County — recovered a judgment against the said — above named on the — day of — 190— for the sum of — and the costs of suit; and the said — having filed — petition in the Supreme Court, held for the Eastern Division of the State of Tennessee, at Knoxville, assigning error therein, and having prayed for and obtained an order from his Honor — one of the Judges of said Court, for writs of certiorari and Supersedeas: Now, if the said — shall well and truly prosecute said Writ of Certiorari with effect in said Supreme Court, then this obligation shall be void, or in case of failure to pay and fully satisfy the debt, all costs and damages, and fully perform the judgment of said Supreme Court.

Given under our hands and seals, this 2nd day of September, 1913.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By Att'ys, PRICHARD, ALLISON & LYNCH.

Attest:

——— ———.

No. 8.

192 *Supersedeas.*

STATE OF TENNESSEE:

To the Sheriff of Hamilton County, Greeting:

Whereas, it has been represented to us by the petition of C., N. O. & T. P. Ry. Co. that D. F. Rankin, et al., obtained a judgment against them in the — Court of Civil Appeals, on the 21st day of July, 1913, for $4750, and that said judgment is erroneous and unjust: And Furthermore, that execution has issued, or is likely to issue to enforce the collection of the same, and the aforesaid C., N. O. & T. P. Ry. Co. having obtained an order from his Hinor Sam C. Williams, one of the Judges of the Supreme Court of said State, for a Supersedeas to issue in said case;

These are, therefore, to command you, the sheriff aforesaid that if you have the property of the said C., N. O. & T. P. Ry. Co. already levied upon, by virtue of said judgment and execution, for-with to restore the same to the said C., N. O. & T. P. Ry. Co. at your peril; and you will also notify said plaintiffs that they — superseded from further proceeding with said judgment and execution until the further order of this Court. And how you shall have executed this process, you will make known to this Honorable Court, at the Court House in Knoxville, the second Monday in September next.

Witness, S. E. Cleage, Clerk of our said Court, at office in Knoxville, the second Monday in September, Anno Domini, 1913.

S. E. CLEAGE, *Clerk.*
——— ——— *Deputy Clerk.*

No. 9.

193 In the Supreme Court of Tennessee, September Term, 1913.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
D. F. and T. C. RANKIN, Defendants in Error.

From Hamilton County Circuit Court.

Assignment of Errors, Brief, and Argument in Support of Petition for Certiorari.

Prichard, Allison & Lynch, Attorneys for C., N. O. & T. P. Ry. Co.

194 In the Supreme Court of Tennessee, at Knoxville, September Term, 1913.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
D. F. and T. C. RANKIN, Defendants in Error.

From Hamilton County Circuit Court.

Assignment of Errors, Brief, and Argument in Support of Petition for Certiorari.

May it Please the Court:

Briefly stated, the material facts in this case are that on the 6th day of November, 1911, defendants in error, D. F. and T. C. Rankin, delivered to the plaintiff in error, the Cincinnati, New Orleans & Texas Pacific Railway Company, nineteen (19) mules for transportation from the place of delivery, Danville, Kentucky, to Atlanta, Georgia.

The shipment was made under a limited liability contract signed by the agent of the Railway Company, and D. F. Rankin, one of the defendants in error, in whose name the bill of lading was issued, and a copy of this bill of lading was filed with the declaration as an exhibit thereto.

The car in which the said mules were being shipped was derailed at Dayton, Tennessee, on account of a collision of the engine with a cow upon the track. A number of mules were killed outright and a number were damaged as a result of the wreck.

195 The plaintiffs' declaration contains two counts.

The first count alleges the delivery of the mules to the railway company and that said shipper agreed to pay "the full freight or tariff charged by the defendant for such transportation on the delivery of said mules at the point of destination; and the defendant accepted said mules for transportation on the terms aforesaid and agreed and became bound to safely transfer and deliver the same in the same sound condition in which they were received."

The declaration then alleged that the railway company failed to deliver the mules at the point of destination, as it had agreed and was bound to do, but instead, "wrongfuly and negligently failed and refused — to do, and in fact negligently wounded, maimed, bruised, and,—it is believed—killed all or a portion of said mules."

It was alleged that said mules were reasonably worth two hundred and fifty dollars ($250.00) each, and that the said defendants in error were entitled to recover forty-seven hundred dollars ($4700.00) with interest.

The second count contains the same averment with reference to the delivery of the mules to the carrier. It refers to, and exhibits as part of the declaration, the bill of lading issued by the railway company at the time of the receipt of the mules.

The declaration avers that while this bill of lading contains a pro-

vision that the railway company shall not be liable for more than seventy-five dollars (75.00) for each of said mules, it was insisted that said limitation was void for the reasons set out in the declaration, which will be hereinafter more fully described.

After setting our and exhibiting the bill of lading and alleging that the limited valuation clause was void for the specific reasons assigned in the declaration, the — then avers:

196 "Defendant wholly failed to perform said contract of transportation; that it did not deliver said horses and mules or any of them to the connecting carrier at Chattanooga, Tennessee, but that the car in which said mules and horses were being transported was wrecked because of the negligence and car-lessness of defendant upon the line of defendant's railway near the town of Dayton, Tennessee, while in defendant's possession, and a number of said horses and mules were killed and the remainder so badly damaged as to be almost worthless."

The second count makes the same allegation with reference to the value of the mules and the damage to the defendants in error as made in the first count.

Rec. pp. 1-7.

Later, defendants in error amended their declaration so as to allege that there was an ordinance of the town of Dayton, Tennessee, regulating the rate of speed at which trains could be operated, and at the time of the accident, which resulted in the injury to the mules, complained that the train was running at a greater rate of speed than provided for in the municipal ordinance of the town of Dayton, and that because thereof the wreck occurred and the injury resulted.

Rec. p. 17.

The pleas of plaintiff in error are set out in the record at pp. 8 to 15. Briefly, these pleas are:

(*a*) The general issue.

(*b*) A denial that the limited valuation clause in the contract sued on was void for any of the reasons set out in the declaration.

197 (*c*) Insistence that the defendants in error had delivered the mules to the railroad company and had represented that the value was seventy-five ($75.00) dollars each, and had secured a freight rate based upon that valuation and were estopped to dispute this valuation.

(*d*) That the defendants in error, having represented the value of the mules to be seventy-five ($75.00) dollars each and secured a rate based upon this valuation, were guilty of a violation of the Act of Congress regulating interstate commerce, by fraudulently obtaining transportation at an illegal rate by the suppression of the information as to the true value, and that hence they could not recover at all.

(*e*) Insistence that this was an interstate shipment and governed by the Act of Congress regulating interstate commerce.

(*f*) A denial of a conversion.

The case was tried in the Circuit Court at Chattanooga, Tennessee, at the January term, 1913, and a verdict for $4508.82 was rendered by the jury.

Rec. pp. 18, 19.

The railway company made a motion for a new trial, which was overruled, and judgment for the amount of the verdict was rendered.

The railway company excepted and prayed an appeal in the nature of a writ of error to this court, which was granted and perfected.

Rec. pp. 19, 34.

The judgment of the Circuit Court was affirmed by the Court of Civil Appeals as set out in our petition for certiorari.

198 *Assignment of Errors.*

The plaintiff in error insists that the judgment of the Circuit Court was erroneaous and that the decree of the Court of Civil Appeals affirming same should be reversed for the following reasons.

(1) Because there is no evidence to sustain the verdict of the jury or the judgment of the court for any amount, the testimony conclusively showing that the injury to the stock of the defendants in error was caused by an unfor-seen accident over which the plaintiff in error had no control, and which its agents and employes could not have avoided in the exercise of proper care.

In the exercise of the power conferred by the Commerce Clause of the Constitution of the United States (Art. 1, Sec. 8), the Congress of the United States on June 29, 1906, passed an act known as the Carmack Amendment to the Interstate Commerce Act, providing that carriers of interstate freight should be liable only for injuries to freight "caused by it." In holding the plaintiff in error liable in this case the Court failed to give effect to this provision of the Constitution and laws of the United States.

(2) Because the Circuit Court erred in charging the jusry as follows:

"Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

(3) The Circuit Court erred in permitting the proof of the rules of the company with reference to the rate of speed at which
199 the trains should be run through the town of Dayton to be introduced, because neither the existence nor breach of such rules is alleged in the declaration, and, further, because it was shown and admitted that these rules were adopted for the protection of persons and animals *of* freight being carried by the Railway Company.

(4) The Circuit Court erred in permitting the proof of the ordinance of the municipality of Dayton to go to the jury, because there was no proof to show that said ordinance was legally and properly adopted.

(5) The Circuit Court erred in declining to permit witness Hartman (the engineer) to testify that he was running the train at the time of the acicdent at the rate of speed at which such trains were usually and customarily run in Dayton and towns of like size, and that he was not running the train at a dangerous rate of speed at the time of the accident.

(6) The Circuit Court erred in holding that as a matter of law the limited valuation clause was invalid, and in instructing the jury that if the defendants in error were entitled to recover, they were entitled to recover the full value of the property.

This is contrary to the provisions of the Interstate Commerce Act, known as the Carmack Amendment, passed June 29, 1906, and published in 34 Stats. at Large, 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288, and violative of the Commerce Clause of the Constitution of the United States.

(7) The Court was in error in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the requirements of the Interstate Commerce Act in filing its rates with the Interstate Commerce Commission.

200 (8) The Circuit Court erred in declining to sustain the limited valuation clause set out in the bill of lading.

(9) The Circuit Court erred in permitting testimony to go to the jury as to the value of the mules, because this value was fixed by the terms of the contract at $75.00 for each mule.

(10) The Circuit Court erred in permitting the defendants in error to testify that they did not read the bill of lading and did not know it contained a limited valuation clause.

Brief.

The first, second, third, fourth and fifth assignments of error involve the question of the liability of the plaintiff in error for the injury complained of in the declaration.

We concede that if the common-law rule of liability of carriers for loss of freight has not been changed by the Carmack amendment to the Interstate Commerce Act, referred to in the first assignment of error, then these assignments of error are not well taken and should be disallowed, because it clearly appearing that the injury and consequent loss complained of were not caused by the act of God nor the public enemy, the carrier was clearly liable under the common law rule.

On the other hand, we insist that the common law rule was superseded by the Carmack amendment hereinbefore stated, and that the carrier was liable only for injury resulting from or caused by its negligence.

The first assignment of error should be sustained.

The injury in this case resulted from an unavoidable
201 accident, caused by a cow suddenly stepping in front of the engine, which caused the train to be derailed.

Record, pp. 87 88 and 108.

The second assignment of error should be sustained.

Carmack Amendment, supra.

Adams Express Co. v. Croninger, 226 U. S. p. 491.

The third assignment of error should be sustained because the matters referred to were not covered by the declaration.

Declaration, Record, p. 1 et seq.

Amendment to Declaration, Record, p. 17.

The objection to this testimony was properly made, and should have been sustained.

Record, pp. 93 and 94.
Coal Co. v. Daniel, 100 Tenn. p. 73.
Railroad v. Lindamood, 111 Tenn. p. 462.
Railroad v. Berry, 118 Tenn. 581.

The fourth assignment of error should be sustained.

Record, pp. 27, 28, 29, 30, 31 and 32.
L. & N. R. R. Co. v. Hirston, 122 Ga. 270.
1st Thompson on Negligence, Sec. 12.
Railroad v. McKenna, 75 Tenn., 313.
Railroad v. Rush, 83 Tenn. 145.

The fifth assignment of error is covered by the authorities above cited.

Assignments of error, six, seven, eight, nine and ten involve the question of the validity of the limited valuation clause.

See Exhibit No. 1 to the Agreement of counsel attached to Record.

202 The Court instructed the jury to disregard this limited valuation clause and gave judgment for the value as shown by the testimony. This was error because the rule heretofore adopted in Tennessee by this Court, on this question has been superseded by the passage of the Carmack amendment to the Interstate Commerce Act.

Since the passage of this act, the question of the validity of limited valuation clauses in bills of lading is a federal question and controlled by the decision of the Supreme Court of the United States.

Adams Express Co., v. Croninger, supra.

The Circuit Court and the Court of Civil Appeals held that this was not a federal question, because it was not shown affirmatively in the proof that plaintiff in error had filed the rates charged in this case with the Interstate Commerce *Act*.

We insist this was error, and that the question as to whether this is a federal question is controlled by the Act of Congress, and not by the act of the carrier.

Under the federal authorities, this contract was valid and enforceable.

Hart v. Railroad, 112 U. S. p. 31.
Adams Express Co. v. Croninger, supra.
Railway v. Carl, 227 U. S. p. 639.
Railway v. Harriman, 227 U. S. p. 657.

Under these authorities, assignments of errors six, eight and nine should be sustained.

The seventh assignment of error should be sustained because the Circuit Court and Court of Civil Appeals were in error in holding that the burden of proof was on the plaintiff in error to

203 show affirmatively that it had filed its rates with the Interstate Commerce Commission.

Clement v. L. & N. Railroad, 153 Federal, 979.
Meeker v. Lehigh Valley R. R. Co. 162 Federal, 359.
Knox County v. Ninth Natl. Bank, 147 U. S. 94.
1st Beach on Mod. Law of Contracts, Sec. 717.
Greenhood on Public Policy, Rule 130, p. 118.
2nd Elliott on Contracts, Sec. 1061.
Chamberlayne's Modern Law of Evidence, Vol. 2, Sec. 1056.
Bradner on Evidence, p. 362, Sec. 25.
Chitty on Pleadings, Sec. 504 and Sec. 507. 31 Cyc. 86.
Young v. Tredegar Iron Co., 85 Tenn., 200.

In holding this question against our insistence, the Court of Civil Appeals took an erroneous view of the pleadings.

Opinion of Court of Civil Appeals, p. 12.
See declaration, supra.
See 3rd, 4th and 5th pleas of plaintiff in error, Record, pp. 8–10.
Shelby County v. Bickford, 102 Tenn., p. 407.

The tenth assignment of error should be sustained because defendant in error, having signed the bill of lading, should not have been permitted to testify, over objection, that he had not read the same.

Record, p. 43.
Railroad v. Stone & Haslett, 112 Tenn. p. 367.
Railway v. Harriman, supra.

We have prepared this brief in strict accordance with
204 the new Rule No. 15 of this Court, requiring that a brief accompanying the assignments of error, stating concisely appellant's "proposition of law and fact without argument or elaboration."

However, under the peculiar facts of this case and the legal questions involved, it is impossible to properly present the case without argument and elaboration, and for that reason we accompany this brief with the following argument:

Argument.

The Court will see that this case involves two general propositions, one being the question of liability and the other the question of the validity of the limited valuation clause set out in the bill of lading. Each is a federal question involving a construction of the Carmack Amendment to the Interstate Commerce Act.

The various errors assigned will be grouped and discussed under these two general headings.

The Question of Liability.

Under the common law rule adhered to by the courts of this State, a carrier is not only liable for loss resulting from its negligence, but is an insurer of the safe delivery of all freight committed to its care against loss from any cause except that resulting from the act of God or the public enemy.

However, we insist that this rule is abolished by the recent amendment to the Interstate Commerce Act known as the Carmack Amendment, passed June 29, 1906, which provides as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading
205 therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

(34 State. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, 1288.)

The effect of this amendment was passed on by the Supreme Court of the United States in the recent case of Adams Express Company v. Croninger.

226 U. S. p. 491.

With reference to the effect of this legislation Mr. Justice Lurton said:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulations or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when
206 Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

It will be noticed that this act does not provide that the carrier shall be liable as an insurer but shall only be liable for loss or damage "Caused by it."

With reference to this provision, Mr. Justice Lurton said:

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue, 'For any loss, damage, or injury to such property caused by it.' or any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make

such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, caused by it. The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a common carrier."

Under the facts of this case, it cannot be successfully
207 insisted that the injury to the plaintiffs' property was 'caused by' the plaintiff in error. There is no dispute with reference to the manner in which this accident occurred.

But two witnesses were introduced on this subject: Charlie Hawkins who was introduced by the defendant in error and M. L. Hartman, the engineer in charge of the engine, the derailment of which caused the injury to the property in question. Each testified as to the manner in which the accident occurred and there is no substantial difference in their testimony. Mr. Hartman, the engineer, said that he was operating the engine, on the train at the time the accident occurred; it was a through freight train going South, and was running about eighteen or twenty miles an hour. It was on a straight track and he could see the track ahead of him for perhaps half a mile. Just before he reached the road crossing inside the corporate limits of the town of Dayton, a cow came suddenly upon the track about 50 or 75 feet in front of the engine. She came from behind an obstruction and the engineer could not and did not see her approaching the track until just before she got on it. He says with reference to this: "She came from behind a car at the road crossing; there was a string of cars along there and there was a space there just wide enough for a wagon to get through and this cow came out from behind these cars, the first I saw of her."

He states that he had already blown for this crossing and immediately when he saw the cow he applied his brakes in emergency, which he says was the proper thing to do and the quickest way in which the car could be stopped. He says he did all he had time to do and that there was nothing else he could have done.

Rec. pp. 87, 88.

208 When the engine struck the cow it knocked her in front of the engine, and when she fell down in front of the engine, the engine "climbed her" (as he expressed it); that is to say, the wheels went up over the cow and this threw the engine from the track. In other words, when the engine struck the cow it knocked her up in the air, but instead of falling off the track to one side or the other, she fell back on the track and immediately the engine was derailed by coming into collision with her and the wheels running up over her.

Rec. p. 88.

This testimony is not disputed in the slightest, except that witness Charlie Hawkins says he was under the impression the train was

COPY BOUND TO

running about 40 or 50 miles an hour. He said, on cross-examination, however, that he could not tell how fast the train was running.

Rec. p. 108.

He says he was in plain view of the engine and the crossing and saw the train coming for some distance. He was asked:

"When the cow appeared on the track the train was right there?"

Ans. "Yes sir."

Rec. p. 108.

Now, manifestly, the engineer was not derelict in his duty with reference *with* keeping a lookout ahead and doing everything possible to stop the train and prevent an accident after the cow appeared on the track, or after he had notice- that she was approaching the track. The engineer testified that he did everything possible, and this testimony was undisputed. He was amply
209 sustained by the plaintiffs' witness, Hawkins, who says that when the cow appeared on the track the engine was right on her, and that the accident occurred almost instantly.

The only negligence alleged in the declaration was the violation of an ordinance of the town of Dayton, which it is alleged forbids the running of trains through the corporate limits of the town at a higher rate of speed than ten miles an hour.

There is no competent proof that such an ordinance was ever adopted. Witness J. L. Henry, City Recorder for Dayton, was introduced, and he testified that he had in his possession a book of city ordinances, and read an alleged ordinance from this printed book. This was objected to by counsel for plaintiff in error because it was not the proper way to prove same.

Rec. p. 27.

The minutes showed that a committee was appointed to codify and publish the ordinances and that the committee made a report submitting a copy of said ordinances (Rec. p. 27) which was adopted (Rec. p. 28).

Witness testified that the compilation handed him had been printed and distributed as the ordinances of the town of Dayton.

Rec. p. 28.

Over the objection of counsel he also testified that this was used as a compilation of the ordinances of Dayton.

Rec. p. 29.

210 Under cross-examination, he showed that he knew nothing of the manner of the adoption of the ordinances except what was shown on the minutes; that he had no way of knowing whether the printed copies of the ordinances contained the ordinances adopted by the proper authorities.

Rec. pp. 31, 32.

Turning, however, to the alleged ordinance, which appears on page 29 of the record, it reads as follows:

TO CLOSE IN CENTER

"SECTION 39. To run, or cause to be run in the city any railroad, engine, train, or car, faster than at the rate of ten miles per hour; or to run over any street or crossing within the city without continuously ringing the alarm bell during the progress over and between said crossing."

The Court will see that this ordinance does not forbid anything. The ordinance does not attempt to make it unlawful to run through the town of Dayton at any rate of speed. The alleged ordinance is absolutely meaningless and can be just as well construed as a permission to run ten miles an hour as a prohibition.

The learned judge who delivered the opinion for the Court of Appeals, in discussing this proposition, said:

"In construing an ordinance, like an act of the legislature, we are bound to put that construction upon it which gives it an intelligent meaning, as well as some force and effect, and to hold it a valid ordinance rather than an invalid one. This appears to be Sec. 39 of the ordinance adopted by the city of Dayton,
211 and, evidently some section precedes it which declares a violation of this one a misdemeanor, and forbids the running of trains or engines at a greater rate of speed than is designated in the ordinance. If this is not true, then the ordinance is meaningless, but presuming, as we think we must do, that there is a preceding section which forbids the running of trains and cars faster than ten miles an hour, and making it a misdemeanor to do so, then, with this presumption, the ordinance in question is not meaningless nor invalid, and for this reason we overrule this assignment."

Here the Court concedes that the ordinance as introduced is meaningless. We submit that this should end the contention. The existence of the ordinance is expressly pleaded by defendants in error. It is the basis of their case. The existence of an ordinance prohibiting the running of trains at a certain rate of speed, and making a violation of it a misdemeanor, is expressly averred by defendant in error and denied by the plaintiff in error. The burden was upon the defendants in error to make out their case by the preponderance of the testimony. The only ordinance they introduced is conceded to be within itself absolutely meaningless. The Court of Appeals seeks to cure this by a presumption that an ordinance had been passed which was not proved and the ex-
212 istence of which was denied by the defendants in error. We admit that when a statute or ordinance is susceptible of two constructions, one of which would render it valid and give it a reasonable meaning, and the other of which would render it invalid or meaningless, the Court will adopt that construction, if the language of the ordinance or statute permits, which would render the ordinance or statute valid or give it a meaning. However, this must be a reasonable construction from the language of the statute or ordinance itself.

In this case, the court, does not pretend to construe the language of the ordinance introduced. On the contrary, the Court admits that the language of the ordinance introduced renders it meaning-

COPY BOUND

less. The Court, however, by presumption, creates a new, independent ordinance that it says it will presume preceded the one introduced in evidence. In other words, the Court presumes plaintiffs' whole case without a word of evidence to sustain the presumption. As the Court say:

* * * But, presuming, as we think we must do, that there is a preceding *sec-ceding* section which forbids the running of trains faster than ten miles per hour, and making it a misdemeanor to do so, then, with this presumption the ordinance in question is not meaningless nor invalid."

We call the attention of the Court to the fact that the alleged preceding ordinance, which the learned Court of Appeals creates by presumption, is the ordinance pleaded and relied upon by
213 defendants in error, full and complete within itself, not even aided nor supplemented by the meaningless ordinance introduced in evidence.

We submit that this is carrying the rule of presumption, with reference to ordinances and statutes, further than any Court in this country had ever carried it. We know of no case in which it is held that an invalid or meaningless statute or ordinance has been cured by the presumption that another valid ordinance or statute had preceded the invalid or meaningless ordinance.

We take it that the mere statement of this question is sufficient to show the fallacy of the position taken by the Court of Appeals.

We take it that the mere statement of this question is sufficient to show the fallacy of the position taken by the Court of Appeals.

Manifestly, this ordinance was utterly meaningless and insufficient to sustain the averments of the declaration. This being true, the whole case must fail as both counts of the declaration are based entirely on the allegation with reference to the violation of this ordinance.

Assuming, however, that this ordinance was legally adopted, and that it does, in terms, prohibit the running of trains at a greater rate of spped than ten miles per hour, there are two conclusive reasons why the violation of this ordinance does not warrant a recovery against the plaintiff in error.

In the first place, the violation of this ordinance was not the proximate cause of the accident. There is not the slightest testimony introduced to show that there was more danger of a derailment resulting from a collision between the engine and the
214 cow while the train was running at twenty miles an hour or forty miles and hout than if the train had been running at ten miles an hour or five miles and hour. The only testimony on this subject was that of witness Hartman, who was an experienced engineer and who testified that there was *n*ore da*m*ger resulting from a collision when the train was running slow than when the train was running fast. He was asked:

Q. "I will ask you whether or not running at a slower rate than 20 miles an hour, say as slow as ten miles or six miles an hour, state whether or not that lessens or increases the danger of derailment when you strike a cow?"

ND TO CLOSE IN CENTER

A. "Well, as a rule, we have more wrecks on account of cattle where they are running slow than where they are running fast."

Q. "Why is that?"

A. "Well, because when you hit stick when you are going fast they generally knock them clear off the track."

Q. "And they do not fall back on the track and fall under the engine?"

A. "No, sir."

Q. "Now I will ask you whether or not it is true that the faster you are running the more apt you are not to derail the engine if you strike an object on the track?"

A. "Yes sir."

Rec. p. 99.

215 This was absolutely undisputed and is manifestly true. Of course the mere violation of an ordinance could in no event give a right of action unless the violation of the ordinance was the proximate and direct cause of the accident.

Unquestionably the ordinance of the town of Dayton was not passed and could not have been passed for the purpose of protecting the freight being carried by trains running through the municipality.

The courts have held that municipalities have a right to regulate the rate of speed of interstate trains through their borders, as an exercise of police power for the protection of the citizens of the municipalities.

Southern Ry. v. King, 217 U. S. 524 et seq. and cases there cited.

Unquestionably, this is the only power the municipality could exercise with reference to interstate trains, and of course the ordinance could only have been for the protection of the citizens of the town of Dayton and their property.

It is unnecessary to cite authorities to this court to sustain the general proposition that any person for whose benefit a statute or ordinance has been passed may maintain a suit for damages resulting to him directly from a breach of such ordinance or statute. This right, however, does not extend to any other class of persons than those for whose benefit the statute was passed.

Mr. Justice Lamar stated in the case of L. & N. R. R. Co. v. Hairston, 122 Ga., 373, while he was a judge of the Supreme Court of Georgia:

"The speed ordinance was passed for the protection of those of the public who were crossing the street. Its violation was not of itself an act of negligence which gave the employee riding on the train a cause of action."

216 And, as stated in Thompson on Negligence, vol. 1, Sec. 12:

"It may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or a municipal ordinance is not of itself a cause of action grounded

upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages."

Notwithstanding the imperative language of Sub-section 4, of Sec. 1574 of Shannon's Code, requiring that every railroad shall keep an engineer or some other person upon the locomotive always upon the lookout ahead, etc., and the express provision of Sec. 1575 of Shannon's Code, that every railroad that fails to observe this precaution "shall be responsible for all damages to persons or property occasioned by or resulting from any accident or col-ission that may occur," still the courts have held that these provisions were intended for the protection of persons and property on the road-bed in front of the engine and not for the protection of passengers or employes on the trains, and that no recovery can be had for an injury resulting from a violation of these statutes to persons on the train.

Railway v. McKenna, 75 Tenn., 313.
R. R. v. Rush, 83 Tenn., 145.

In the third assignment of error we insist the Court erred in permitting th- proof of the rules of the Company with reference to the rate of speed at which trains should be run through the town of Dayton, because neither the existence nor breach of these rules is alleged in the declaration. On the trial of the cause the engineer, Hartman, was asked by counsel for defendant in error whether or not the Company had a rule providing that trains should not be run through the town of Dayton at exceeding six miles per
217 hour and that same should be under control, and if this rule was violated. This was objected to by counsel for plaintiff in error on the ground that no such matter was alleged in the declaration, which objected was overruled; to which the plaintiff in error excepted.

Rec. pp. 93, 94.

With reference to this exception and assignment of error the Court of Appeals, in their opinion say:

"It was not necessary that plaintiff allege the existence of such rules and their violation in order to make such evidence competent. The declaration avers negligence generally, and defendant seems to have been satisfied with that charge in the declaration; and it was competent for the plaintiff, under this averment, to prove any act of negligence by the employes of the Company, including the existence and the violation of its rules regulating the speed of its trains in incorporated towns, and for this reason we do not think the Court was in error in permitting this proof to go to the jury."

Opinion, pp. 10, 11.

It is true that each count of the declaration, as originally filed, simply alleged that the injury resulted from the negligence of the Company, without specifying in what that negligence consisted. But the learned Court manifestly overlooked the fact that the following amendment to esch count of the declaration was made:

"In this cause, on motion of plaintiffs, they are allowed to so amend both counts of their declaration as to aver therein that the mules, the value of which is sued for, were killed, injured
218 and damaged while in defendant's custody under the contract sued on and while defendant, as a common carrier, was transporting said mules through the town of Dayton, a municipal corporation in Tennessee; that the train whereon said mules were being transported, was wrecked in said town of Dayton while being operated in violation of municipal ordinances of said town regulating the rate of speed at which such trains should be operated, in that the train was being operated at a greater rate of speed than permitted by said ordinances. when the wreck was caused or directly contributed to by defendant's failure to comply with said City Ordinance which was then in full force. And hence defendant is liable for the value of said mules as contended in the original complaint.

"To this declaration as this amended, the defendant is allowed to rely on its seven original pleas and its 8th and 9th additional pleas recently filed. And on each and all said pleas the plaintiffs have this day joined issue, and by consent this suit will stand for trial February 25, 1913."

Rec. p. 17.

As thus amended, each count of the declaration specifically alleged the negligence complained of, which caused the injury to the property of the defendant in error, to have been the breach of the ordinance of the town of Dayton.

Having thus specifically pointed out the particular negligence complained of, it is well settled in this State that plaintiff will not be permitted to prove or rely upon any other act of negligence except that specifically alleged. The exact question was considered by the Court in the case of East Tenn. Coal Co. v. Daniel, 100 Tenn. 73, where the Court said:

219 "The general rule is that in actions for personal injuries resulting from negligence, it is sufficient for plaintiff to allege, in general terms, that the injury was occasioned by the carelessness and negligence of the defendant. An allegation of the extent of the injury and the manner in which it was inflicted, is sufficient, without specifying the grounds of liability or circumstances of negligence. Chiles v. Drake, 2 Metc. (Ky.), 146. But where definite acts of negligence are alleged in the declaration as grounds of liability against the defendant, the proof will be confined to the acts alleged. Ga. R. R. Co. v. Oaks, 52 Ga. 410."

This case was cited with approval in case of Railroad vs. Lindamood, 111 Tenn., 462, where Chief Justice Beard said:

"It is well settled that the evidence of the plaintiff must conform to the specific acts of negligence alleged in the declaration."

The authorities on this question are fully reviewed by the present Chief Justice of this Court in the case of Railroad v. Berry, 118 Tenn., 581, and our insistence on this proposition fully sustained.

At page 588 he quoted, with approval, fro- Abbott on Trial Briefs, p. 1505, Sec. 333, as follows:

"But when the general allegation is followed by the specification of the acts of negligence complained of, or the negligence is specifically set forth without general allegation, the evidence will be confined to the issue so limited, and proof of other facts will constitute a variance."

220 That this error was of vital importance is manifest. The alleged rule required that the engineer must not run his train at a greater rate of speed than six miles per hour, and slow enough to be under the control of the engineer. Under the facts hereinbefore set out, this was the only possible negligence that the jury could have based their verdict upon.

Indeed, the learned Court of Appeals in their opinion specifically refer to this as an important factor in holding that the jury were warranted in the finding that the engineer was guilty of negligence.

Opinion, pp. 6, 8 and 9.

In this connection we call the Court's attention to the second assignment of error, which complains of the Court's charge as follows:

"(2) Because the Court erred in charging the jury as follows:

"Negligence is the want or lack of exercise of that degree of care which the particular circumstances demanded. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

With reference to this the learned Court of Appeals say:

"While this is, perhaps, not the exact verbiage his Honor should have used, it is evidently stated in an off-hand way, without much, if any thought."

Opinion, p. 11.

We submit that if the instruction was erroneous, as manifestly it was, its injury to the plaintiff in error, is not lessened by the fact, if fact it be, that the learned Court delivered his charge "without much thought," or in an off-hand manner. It was on instruction to the jury on the very point that controlled the question of

221 the Company's liability. If the Company was to be held to the "highest degree of care," then the jury might well have conjectured some extraordinary precaution that the engineer might have taken which might have prevented the accident.

Again, the Court of Appeals, in their opinion state, with reference to the particular instruction complained of:

"* * * counsel insisting that this rule applies only to the carriage of passengers. Strictly speaking it may be true that the rule stated by the learned judge does not apply to mules, but only to passengers, and yet, the rule as stated by his Honor is no stronger than the common law, which makes the Company liable for the safe transportation of mules, or other freight, unless prevented from doing so by the act of God, or the public enemy."

Opinion, p. 11.

Of course the Court of Appeals were right in concluding as they manifestly do, that this charge can only be justified on the theory

that the common law rule has not been changed by the Carmack Amendment, and that common carriers are still liable, as insurers for all freight lost, except by the common enemy or the act of God. And so, at last, we must conclude that the Court's charge is erroneous if any force and effect is to be given to the Carmack Amendment.

As Congress has assumed control of the regulation and liability of carriers of interstate freight, there must be a uniform rule governing this liability, effective alike in all states. The states cannot be permitted to establish their own rules of liability because this would destroy the principle of uniformity essential to national control of this question. The Carmack Amendment puts
222 new burdens on the carriers of freight. It makes the initial carrier liable for freight lost on the lines of connecting carriers as well as on its own line. The liability of the initial carrier for loss on the connecting line is for such loss as is "caused by" the connecting line, and in the same language the initial carrier is liable for such loss on its own line as is "caused by it." Manifestly, it was not intended by Congress to make the initial carrier liable for any loss on the connecting line except such as is caused by the negligence of such connecting carrier. Yet the liability of the initial carrier for loss on its own line and a connecting line is, under this Act, exactly the same.

It is therefore manifest that the first, second, third, fourth and fifth assignments of error should be sustained.

Limited Valuation Clause.

The contract of shipment was signed both by the agent of the plaintiff in error and by D. F. Rankin, defendant in error. It was filed as exhibit No. 1 to plaintiff's declaration. This contract was the basis of this suit. Among other provisions in the bill of lading is the following:

"That this agreement is subject to the following terms and conditions which the said shipper accepts as just and reasonable and which he admits having read and having had explained to him by the agent of the said carrier, viz:

"That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum valuations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

223 "Mules not exceeding $75.00.

"That the tariff regulations of said carrier provide that for further increase of 100 per cent, or fraction thereof, in the above valuation, there shall be an increase of 50 per cent in the fright rate; and

"That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not in any case of loss or damage to said livestock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby

agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated."

Both the defendants in error were stock men who had been shipping stock over this and other roads for many years.

D. F. Rankin, who signed the contract, testified that he had been shipping mules from Danville, Ky., seven or eight years.

Rec. p. 43.

He says he knew what the rates were, and that he had been paying $95.00 per car from Danville, Ky. to Atlanta, Ga.

Rec. pp. 42-43.

The witness D. F. Rankin testified that he did not read the contract at the time it was entered into. This was objected to by counsel for plaintiff in error. The objection was overruled, and exception entered.

Rec. p. 43.

224 The said witness testified that he did not see any rates posted and that he did not look for any.

Rec. p. 44.

The defendants in error took the stock to the stock yard, which was some distance from the depot and from thence went to the depot and applied for and received the bill of lading. The agent of the Company did not see the stock and knew nothing about the same, except what was represented by the shipper.

Rec. p. 46.

Nothing was said by either the shipper or the agent of the carrier with reference to the valuation of the stock, except what appears in the bill of lading.

The defendants in error introduced testimony over the objection of the plaintiff in error, showing a valuation of from $200.00 to $250.00 for each of the mules.

Plaintiff in error objected to this testimony on the ground that the valuation in the bill of lading cannot be contradicted by parol testimony, and the objection was overruled by the Court, to which plaintiff in error excepted.

No proof was introduced on either side to show whether the rates charged the defendants in error, and set out in the bill of lading sued on in this case, had been filed by the plaintiff in error with the Interstate Commerce Commission before the shipment in question.

The Circuit Court held that, as a matter of law, the contract for limited valuation set out in the bill of lading was void, and charged the jury that if plaintiff in error was liable the verdict should be for the full value of the mules, as shown by the testimony.

225 In this, we submit, the Court was manifestly in error, and the Court of Appeals was in error in not reversing the case on this ground.

We concede that if the Carmack Amendment to the Interstate Commerce Act had not been passed, this case would have been controlled by the laws of the State of Tennessee existing before the passage of this act, as construed by our Supreme Court in the case of Railroad v. Stone & Haslett, 112 Tennessee, p. 367, and the case of Railroad vs. Smith, 123 Tennessee, p. 706, and the Court's position would have been tenable. But, by the passage of the act referred to, Congress has assumed entire control of this question, and th construction of this contract is a federal question and the rights of the parties thereunder depend upon the decisions and rulings of the Supreme Court of the United States.

The Circuit Court and the Court of Civil Appeals assumed that the question as to whether this was a federal question to be controlled by the previous decisions of this Court depends upon the question as to whether the carrier had filed with the Interstate Commerce Commission the rate charged in this case and set out in the bill of lading. As no proof had been offered on this subject, the only question which seems to have been considered by the Court of Civil Appeals, was whether the burden of proof was on the carrier or on the shipper to show how this fact was. After a consideration of the question, the Court held that the burden of the proof was upon the carrier, and, as a result, held that the case was not controlled by the act of Congress or the decisions of the Supreme Court of the United States, but by the previous holdings of this Court and that therefore the contract was void.

226 Manifestly, the Court was in error. Whether this is a federal question to be controlled by the acts of Congress, or not, cannot depend upon any act or omission of either of the parties to the contr*a*t. This must depend upon the act of Congress and not upon the act of the parties.

The declaration charged, and all the evidence clearly established, that this was an interstate shipment. This being true, the only question remaining is whether or not there was an act of Congress controlling this shipment. That part of the act in question necessary to be considered is as follows:

"That any common carrier, railroad, or transportation — receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

In the case of Adams Express Co. v. Croninger, supra, this question was fully considered by the Supreme Court of the United States, and, as hereinbefore shown, the Court held that by this act Congress assumed the absolute control over this subject.

By this act, as held by the Supreme Court of the United States in the case referred to, all enactments, constitutional provisions, policies and regulations of the various states, and the Courts in

227 said states, on this subject, have been absolutely abrogated and superseded. As Mr. Justice Lurton said:

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation- to which they had been theretofore subject."

The learned Court of Civil Appeals, in their opinion, (at page 18 thereof), seemed to construe the opinion of Mr. Justice Lurton as holding that the question as to whether or not the act of Congress applied to this transaction depended upon the filing of the rates with the Interstate Commerce Commission by the carrier.

There is no such intimation in the opinion referred to. On the contrary, the Court expressly holds in that case that it is the act of Congress which supersedes the state laws and regulations, and which makes the question involved here a federal question and one which the Supreme Court of the United States has jurisdiction to consider and determine.

This is manifestly true because the Carmack amendment doesn't refer to the question of filing rates with the Interstate Commerce Commission.

228 The act expressly provides that the carrier "shall issue a receipt or bill of lading." The bill of lading in this case was issued under the express requirement of this act. The requirement that the rates must be filed with the Interstate Commerce Commission had been in force long prior to the passage of this amendment, but the Courts held that the Interstate Commerce Acts, prior to the passage of the Carmack Amendment, did not abrogate state legislation and state policies on this subject, and that under these acts prior to the passage of the said amendment the filing of the rate by the carrier with the Interstate commerce Commission did not give validity to limited valuations nor make a consideration of the same a federal question.

This was expressly decided in the case of Pennsylvania Railroad v. Hughes, 191 U. S., 477.

As before stated, it was the passage of the Carmack amendment requiring the issuance by the carrier of a bill of lading for property shipped from one state to another, and making the initial carrier liable for losses caused by connecting carriers, that abrogated state laws and conferred upon the Supreme Court of the United States the final determination of all questions arising out of the liability of carriers for losses in interstate shipments.

Manifetsly, it would be absurd to say that, although Congress had, pursuant to its constitutional right under the commerce clause, assumed direct control over this whole subject, yet the carrier might abrogate this law so far as it applied to it, by merely failing to do

what the law required of it—that is, file its schedules with the Commerce Commission.

Suppose in this case, the accident and consequent loss had occurred on the Southern Railway (the connecting carrier):
229 Could the plaintiff in error have defended this suit on the ground that the Carmack amendment did not apply, because it had failed to file its schedules of rates with the Interstate Commerce Commission? Manifestly, such a defense could not be maintained.

Therefore, this act of Congress does apply to this transaction. The right of defendants in error to recover against the plaintiff in error in this case arises alone out of this act of Congress; all state laws and policies, both of the states of Kentucky and Tennessee, having been superseded and abrogated by the passage of this act.

It is, therefore, a federal question controlled by the decisions of the federal courts, especially the decisions of the Supreme Court of the United States.

As stated by Mr. Justice Lurton, "there must be uniformity in enforcing the rights of parties under this act, and such rights cannot be made to depend upon the policies, laws, rules, or decisions of the various states."

We must turn, therefore, to the decisions of the Supreme Court of the United States to see whether or not, under the facts of this case, the Circuit Court and Court of Appeals were correct in holding that, as a matter of law, the limited valuation contract was void.

It will not be disputed that the leading American case on this subject is that of Hart vs. Pennsylvania R. Co., 112 U. S. p. 331. Adversary counsel will search in vain for a real distinction between the valuation contract in that case and the one in this case.

Both the Circuit Court and the Court of Civil Appeals base their decisions as to the invalidity of this contract on the ground that the value of the mules set out in the contract is $75.00 each, whereas the proof showed it to be approximately three times that amount; and, following the Smith & Stone & Haslett cases referred
230 to and assuming that this case is controlled by the decisions of this Court, it was held on this ground alone that this contract was void.

No such rule has ever been adopted by the Federal Courts. On the contrary, in the Hart case referred to, the plaintiff shipped five valuable horses in a car, under a bill of lading with a limited valuation clause, very similar to the one we have in hand, limiting the value of the entire carload lot to $1200.00. The stock were destroyed through the negligence of the carrier. The proof showed the value to have been $19,800 more than sixteen times the agreed valuation. Yet, the Court held that this was a fair and reasonable contract and the shipper was only permitted to recover the amount of the agreed valuation. Few American cases have been cited oftener than that case. It was cited with approval in the Croninger case, supra, in which case the agreed valuation was only a little over a third of the real value of the property, and was sustained.

In the case of Chicago &c. Railway vs. Latta, 226 U. S. p. 519, the agreed valuation for the animal sued for was $100.00. The Court did not treat the question as to the real value as at all material, but we find upon an examination of the opinion in the same case, 172 Federal, 850, that the real value was $2500.00, twenty-five times greater than the agreed value which was sustained by the Court.

In Chicago &c. Railway Co. v. Miller, 226 U. S. p. 513, we find that the agreed valuation of the animal sued for was $100.00 and that the proof showed the actual value to have been $2,000.00. In other words, the real value was twenty times the agreed value, and yet the agreed valuation contract was sustained.

231 In Railway v. Harriman, 229 U. S. p. 657, the real value of the property lost was $10,640—the agreed value sustained by the Court *of* $380.00.

One of the cases cited by Mr. Justice Lurton in his opinion in the Croninger case was that of Bernard v. Adams Express Co., 28 L. R. A., (new series) 293. The limited valuation was $50.00. The proof showed the real value to be $154.80; yet the limited valuation was sustained.

Another case referred to by Mr. Justice Lurton with approval was that of Greenwald v. Barrett &c., 35 L. R. A. (new series) 971, where the limited valuation was $50.00 and the real value $235.00. The limited valuation was sustained though it was only one-fifth of the value.

It is thus manifest that the Supreme Court of the United States does not regard the difference between the real value and the agreed value as at all material.

That should certainly be true in a case such as we have in hand, where the shipper knew and that carrier did not know the real value of the property shipped. The shipper knew that the agent of the carrier had not seen this property and did not know its value. On the contrary, the carrier handed to the shipper a bill of lading, in which was plainly and distinctly printed the provisions that the value of the mules would be assumed to be not exceeding $75.00 each, and the rate would be charged accordingly unless a higher value was declared by the shipper.

The defendants in error were experienced shippers who had many times before shipped at this same rate, which was $95.00 per carload, and received similar bills of lading.

The Court improperly permitted the defendants in error to testify that they did not read the contract. This was done over the objection of counsel for plaintiff in error. This Court, in the

232 case of Railroad v. Stone & Haslett, supra, expressly held that this was error, and that a shipper was conclusively presumed to know the contents of the bill of lading received by him. Especially would this be true in the case at bar, where the bill of lading was not only received but signed by the shipper.

Railway v. Harriman, 227 U. S. P. 671.

The Court of Appeals say in their opinion:

"If the Company had any other rate than the one it agreed for

the transportation of this freight, it did not disclose that fact to the shipper."

Again—

If it had a shipping contract with unlimited liability it did not make that fact known to the shipper, and give him a chance to choose between the two."

Opinion—Court of Appeals, p. 18.

In this, the Court was manifestly in error. The contract provides:

"That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase fifty per cent in the freight rate; and

"That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of the values stated above, which are in excess of the values stated above, which
233 are hereby agreed to be not less than the just and true values of the animals, unless an additional amount as herein stated and paid for."

This was a sufficient offer of two rates:

Railway v. Harriman, 227 U. S. P. 657, et seq.

Here the shipper knew and for many years had been paying the same freight rate that he agreed to pay at the time of this shipment.

In each count of their declaration, plaintiff- state that they agreed "to pay the full freight or tariff charged by defendant for such transportation."

So it is not pretended that there was any misunderstanding as to the rate they were to pay.

The contract, in express terms, provided that the shippers could declare an increased valuation. There was nothing to hinder the shippers from declaration of any valuation they thought proper on their property. The rate for this increased valuation was clearly laid before them. They manifestly had an option to ship at the valuation of $75.00, or a valuation of $225.00 if they so desired.

In the second count of the declaration it is alleged that this agreed valuation is void for five reasons:

(1) It is claimed that the contract was made in Kentucky, and that the limited liability clause is invalid under the laws of Kentucky.

It is not now insisted that this objection was well taken.

234 (2) That the clause was void because the valuation placed upon the mules was unreasonable when compared with the real value thereof.

This objection we have just discussed.

The third reason is as follows:

(3) No other contract or transportation was mentioned or offered to plaintiffs, nor did they or either of them have any knowledge

COPY BOUND TO

or information that the shipment was to be made at a reduced rate and under a stipulation for limited liability, nor was any option given to ship either under a common law contract, without limitation on the amount of the liability, or under the contract as actually delivered; nor was any option whatsoever offered them or brought to the attention of them or either of them."

We have just shown that this is not true, but that on the contrary, the shipper had his option to have shipped at any valuation he desired to declare, at the rate plainly set out in the bill of lading for his consideration.

(4) That there was no consideration to sustain the limited liability stipulation.

It was held in the Hart case, supra, that the reduced freight rate was a sufficient consideration. This objection was not insisted on in either of the courts below, and, we take it, will not be seriously relied upon.

The fifth was that the defendant and plaintiff- were not on the same footing, and that the carrier was in a position to practically dictate the terms to the plaintiffs. Of course this means nothing.

If such an objection should be treated as good, then no
235 contract between the carrier and a shipper could be sustained, unless there were rival lines between the points of shipment.

This objection was not considered in either of the Courts below, and of course will not be relied upon here.

It will thus be seen that none of the grounds upon which this contract was attacked, in the declaration of defendants in error are at all tenable, under the holdings of the Supreme Court of the United States, and it is, therefore, manifest that the Circuit Court was in error in holding, as a matter of law, that this contract was illegal.

The only possible difference that the filing of the rate in question with the Interstate Commerce Commission could make, in this kind of case, would be with reference to the reasonableness of the rates set out in the bill of lading.

It has been uniformly held by the Supreme Court of the United States that if the rates have been filed with the Interstate Commerce Commission, then their reasonableness can only be attacked in that forum. No court, state or federal, can consider the question of the reasonableness of the contract after it has been filed with the Interstate Commerce Commission.

Railway Co. v. Abilene Oil Co. 204 U. S. p. 426.
Railway Co. v. Coal Co. 215 U. S. p. 481
(and cases cited).

And so, in this case, if plaintiff in error had filed the rates, set out in the bill of lading, with the Interstate Commerce Commission, their reasonableness could not be considered by this Court, or by any other Court, until that question had been considered and passed upon by the Interstate Commerce Commission.

The question as to whether or not the carrier is entitled to the presumption that it has complied with the law and filed its rates with the Interstate Commerce Commission will be considered further on.

D TO CLOSE IN CENTER

For the present we will continue the assumption upon
236 which we have been discussing the case, that this was not done. We insist that it can make no difference in this case because, as has been shown, no attack has been made in the declaration or any other pleadings as to the reasonableness of the rates set out in the bill of lading.

In the third ground of attack set out in the second count of the declaration it is insisted that there was "no option given to the shipper either under a common law contract without limitation as to liability or under the contract as actually delivered; nor was any option whatsoever offered him."

As we have heretofore shown, this is not true. The bill of lading under which the suit was brought expressly provides for the very thing which this declaration insists was wanting.

In other words, the declaration insists that no other rate or optional rate was offered the shipper.

The reasonableness of the rate offered was not questioned and of course cannot now be questioned.

Neither was there any proof offered on this subject. In the absence of either pleading or proof we must assume that the rates set out and provided for in this bill of lading were reasonable. It is of course well known that there is great danger and risk to the carrier in handling and shipping all kinds of live stock. The carrier has a right to know the values of the stock shipped. The risk which it assumes in undertaking the carriage is manifestly increased as the value of the live stock is increased and, therefore, in the absence of either pleadings or proof to the contrary, we must assume that this plaintiff in error has failed to do that which the law requires it to do.

The act of Congress unquestionably requires all carriers to
237 file their rates with the Interstate Commerce Commission. A heavy penalty is denounced against all carriers who fail to file their rates with the Interstate Commerce Commission or to ship at any other rate than that provided for in their schedule filed with the Commission. It is made an offense punishable both by fine and imprisonment for either carrier or shipper to ship at a rate other than that provided by the schedules filed by the carrier with the Interstate Commerce Commission.

The question of whether or not it will be presumed, in the absence of any evidence on the subject that a railway company subject to the terms of the Act to regulate Commerce (U. S. Comp. Stats. 1901, p. 3154; U. S. Comp. Stats. Supra, 1907, u. 892) has complied with the positive requirements of that act and filed with the Interstate Commerce Commission its schedule of rates has, so far as we have been able to find, been passed upon by only two courts in the United States, both of them being federal courts.

The first case is Clement v. L. & N. R. R. Co. 153 Fed. 979. This was a suit to recover damages by reason of the refusal of the railroad company to deliver three cars of lumber, which lumber the railroad company declined to deliver until certain charges demanded by it had been paid. There was a judgment for the defendant dismissing the suit. The court says:

"There is no allegation that the charge complained of is in viola-

tion *to* the tariff rates which it is the duty of the defendants to submit to the Interstate Commerce Commission, and to post and act on
when allowed by that body. The petition neither alleges nor
238 denies that there was a duty filed and posted tariff rats applicable to the freight charges herein complained of. As the defendant is, and is averred to be, engaged in interstate commerce, it is the defendant's legal duty to comply with the requirements of the Interstate Commerce *Commission* Act. The petition does not suggest that this requirement has not been complied with, and the allegation that the discrimination is against all consignees under local bills of lading and under rules of a car service association, irrisistibly implies that the charge complained of was made under a tariff. In the absence of a positive charge, and of even an intimation in the petition that the defendant has violated the statute, by failing to post a tariff, I am bound to presume that the defendant has done what the statute requires, and has duly filed and posted its tariff, and that the charge complained of is made thereunder.

The second case is that of Meeker v. Lehigh Valley R. Co., 162 Fed. 359. In this case, the Court sustained the demurrer to the bill which sought to have certain rates declared unlawful. The Court says:

"It seems to me very plain that the Congress of the United States, having full power in the premises, has established this commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the transportation of Interstate commerce are legal and what are illegal; that is, what rates are proper and just
and reasonable and what are improper, unjust, excessive, and
239 consequently when so desired, illegal. It also seems clear to me
that all complaining shippers are *regulated* to this commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness and reasonableness of the rates established, filed, published and posted. And I think it presumed, in the absence of averments to the contrary that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing, publishing and posting them."

Neither of these two cases just cited appears further in the Federal Reporter or the United States Supreme Court Reporter, and, presumptively, the decision of the courts in these cases *were* accepted as final.

Confessedly there was a contract of shipment in this case, written and signed by both parties. The positive mandate of the law required the Railway Company to charge, and the shipper to pay the rate which had been filed with the Interstate Commerce Commission, and the giving or acceptance of any other rate would have been a violation of the law and would have subjected both the Railway Company and the shipper to a heavy penalty.

It is true that the failure of the Railway Company to have on file with the Interstate Commerce Commission the rate which it charged in this case would have subjected that Railway Company to a heavy

penalty and its action would have been a violation of the terms of the Act.

R. R. v. Abilene Co. 204 U. S. 445, 51 L. Ed. 561;
R. R. v. Hefley, 158 U. S *pp.* 39 L. Ed. 910;
R. R. v. Hugg, 202 U. S. 242, 50 L. Ed., 1012.

"It is a rule of a very general application that where an act is done which can be done legally only after the performance of some
240 prior act, proof of the latter carriers with it a presumption of the due performance of the prior act."

Knox County v. Ninth Nat Bank of N. Y. 147 U. S. 94, 37, L. Ed. 95.

"The presumption of the legality of contracts.—The law does not assume an intention to violate the law, nor will an agreement be admitted to be illegal where it is capable of a construction which will uphold it and make it valid."

1 Beach on Mod. Law of Contracts, Sec. 717.

"When a contract is valid, in the absence or existence of certain facts, but otherwise void, it is, in the absence of evidence, presumed to be valid, and the burden of proving the absence or existence of such facts lies upon him who asserts its invalidity."

Greenhood on Public Policy, Rule 130, p. 118.

"The law does not presume that parties to a contract intend by it to accomplish an illegal object, but it rather presumes that they intend to accomplish a legal purpose."

2 Elliott on Contracts, Sec. 1061.

"That a business e*b*terprise will not be undertaken until all necessary legal authority *it* procured, * * * will be presumed or assumed."

Chamberlayns's Mod. Law of Evi. Vol. 2, Sec. 1056.

"Illegality of Contract.—It is presumed that every man obeys the law, and, as a general rule, illegality to be admissible, must be pleaded. It is never presumed."

Bradner on Evidence, p. 362, Sec. 25.

"In every species of assumpsit, all matters of confession and avoidance, including not only those by way of discharge, but those
241 which show the transaction to be either void or voidable in point of law, on the ground of fraud, or otherwise, shall be specially pleaded."

Chitty on Pleading, Sec. 504.

"Illegality of consideration must be pleaded specially as a defense."

Idem, Sec. 507.

In McWethey v. Aurora Elec. Light Co., 202 Ill., 219, the facts were that a suit was brought to enjoin the construction of Electric

COPY BOUND TO

Light appliances on the streets of the city, in pursuance of an ordinance granting the authority. One objection urged was that the consent of the proper parties had not been obtained before the erection work was begun. As to this, the Court say:

"It (the consent) may be parol or in writing, and where work is begun upon a street, the presumption would be that consent had been given by the proper authorities of the City." "A material fact if not alleged is presumed not to exist."

31 Cyc. 86.

"The presumption against illegality, and its equivalent expressions that there is no presumption against legality, or in favor of illegality, that there is a presumption in favor of legality that facts consistent with legality are presumed to exist or that where a situation is explainable on the basis of legality it will be assumed that such is the true explanation present a rule of administration that he who claims the existence of illegality must prove it."

242 The Court of Appeals, however, held that this question had been settled adversely to our insistence by the case of Railway v. Horne, 106 Tenn., p. 73. In that case it was held, in an opinion delivered by Judge Caldwell, that the filing of the schedule of rates with the Interstate Commerce Commission was not sufficient to put a rate in force; that before said rate was in force the carrier must make publication of said rate by posting as required by the act and that the burden was upon the carrier to show that this had been done, as a condition precedent to the enforcement of the rate.

The principal announced in that case has been expressly disapproved by the Supreme Court of the United States in the case of Texas Pacific Railway Co., v. Cisco Oil Mill, 204 U. S. 449. In which case it was expressly held that the requirement that the schedule be "posted in two public and conspicuous places in every depot was not mase a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate."

This being a Federal question, of course the decision of the Supreme Court of the United States on such Federal question overrules and must prevail as against the decision announced by Judge Caldwell.

The case of Carey-Lombard Lumber Company v. Thomas, 8 Pickle, 594, is also referred to in the opinion of the Court of Appeals, as holding that the burden of proof is on a foreign corporation to show affirmatively that it has complied with the requirements of the statute of Tennessee with reference to foreign corporations doing business in the State, as a condition precedent to its right to recover on any contract executed within the State.

243 The question is not analagous to the question at bar, but, if it were, the case referred to does not militate against our insistence. In that case, the record showed affirmatively the date on which the foreign corporation had complied with the Tennessee statute by filing its charter with the *Tennessee statute by filing its*

TO CLOSE IN CENTER

charter with the Secretary of State. In this situation, we think the Court was correct in holding that it would not be presumed that the charter had been filed earlier than that time; and the contract sued on having been executed prior to the date on which the record showed the charter had been filed, it was properly held that the contract was illegal.

In case decided later during the same term (L. & N. Railroad v. M. & T. Railroad, 92 Tenn., 693), Judge Wilkes held, in effect, that the presumption was that the foreign corporation had complied with the statutory requirements, until the contrary was shown.

The question was directly involved in the case of Young v. South Tredegar Iron Co., 85 Tenn., p. 200, in which case Judge Lurton, speaking for the Court, said:

"We can but presume, in the absence of proof to the contrary, that this corpo*ar*tion has filed its charter with the Secretary of State, and that it is lawfully, and not unlawfully, exercising its faculties with this State under the very terms of the legislative permission by which it is here adopted."

The real insistence, however, of adversary counsel is stated in the opinion of the Court of Appeals as follows:

244 "The plaintiffs, with much force and ability, insist*e*, that inasmuch as the defendant, in some of its pleas, averred it had performed these requisites, which averments plaintiss denied, that the burden of proof was on the Company to sustain these averments, and there being no proof that it had complied with the Act of Congress in these respects that its limited liability contract was a nullity. It is a familiar rule of procedure, and one long settled, that a party to a suit, averring an affirmative fact, has the burden of proof upon him to sustain it. If the plaintiff avers a fact in his declaration, which is denied in the plea, the rules require him to sustain, by proof, his affirmation. If the defendant sets up an affirmative defense, which, if true, is a bar to the plaintiff's action, the burden of proof is upon him, or it, to sustain such defense."

Opinion of Court of Appeals, P. 12.

This again brings us to a consideration of the pleadings of this question.

We wish particularly to call the attention of the Court to the fact that defendant in error files with his declaration as an exhibit the contract of shipment, and specifically sets out the contract limitation upon the valuation of each animal, and then attacks that clause of the contract upon five specific grounds already fully set out and discussed.

245 Upon these grounds only defendant in error assailed the contract of limited liability.

Defendant in error did not plead that the contract was illegal for the *r*reason that the rate charged was one condemned by law because not filed with the Interstate Commerce Commission. There was no such intimation in the declaration.

The first plea of plaintiff in error merely traversed the averments of the declaration with reference to negligence—being a plea of not guilty.

The second plea denied a breach of the contract of carriage.

The third, fourth and fifth pleas are as follows:

"III. For further plea defendant denies that any part of the contract of shipment filed as exhibited "A" to the plaintiffs' declaration is void for any reason, but says that said contract is valid and binding and pleads the same as a complete bar to plaintiffs' right to recover in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment."

"IV. To so much of said declaration as avers that the contract Exhibit "A" to plaintiffs' declaration, is void and of no effect for the reason that said contract was made in the State of Kentucky and that under the Constitution laws and decisions of the Court of Kentucky, the stipulation containing the limited valuation clause is invalid, the defendant for plea says:

"(*a*) That the contract exhibited with the plaintiffs' declaration shows that the contract was not to be wholly performed in the State of Kentucky, but was to be partly performed in the State
246 of Tennessee and Georgia; that the injury complained of occurred in the State of Tennessee, and therefore the Constitution and laws of Kentucky would not govern, and the rights of the parties under the contract are not to be determined by the Constitution and laws of Kentucky."

(*b*) That the contract for the breach of which recovery is sought is an interstate contract, providing for the shipment of live stock from Danville, a point in the State of Kentucky, to Atlanta, a point in the State of Georgia; that the validity of said contract is not governed by the Constitution or laws of the State of Kentucky, and that said contract is valid and binding upon plaintiff and defendant and defendant relies upon the conditions thereof as a complete bar to any recovery in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment.

"V. For further plea to so much and such parts of the plaintiffs' declaration as charge that the contract filed as exhibit "A" to plaintiffs' declaration is invalid because (*a*) the contract is unreasonable, (*b*) no other contract of transportation was offered to plaintiff, or no option given to plaintiff to ship under a common law contract without limitation on the amount of liability, (*c*) that there was no consideration to sustain the limited liability stipulated in
247 the contract, and (*d*) that the plaintiff did not assent to the terms of said contract, defendant says that said contract is not invalid for these or any other reasons, but the same is valid and binding, having been entered into freely and knowingly by the plaintiff; that plaintiff having, at the time said contract was entered into, the option of shipping said stock under the contract executed, which is filed as Exhibit "A" to plaintiff's declaration, or under a contract of common law liability at a higher freight rate, which was also reasonable."

Trans, pp. 8-10.

In each of the remaining pleas, the fact of the filing of the schedule of freight rates with the Interstate Commerce Commission is expressly alleged.

Does this allegation in these please shift the burden of proof to the plaintiff in error, as held by the Court of Appeals?

In the case of Shelby County v. Bickford, 102 Tenn. this Court say (at page 407):

"It is insisted, however, that inasmuch as the defendant did not plead non est factum, demur, or crave oyer, and did plead covenants performed and went to trial on such issue, he waived the objection this assignment of error raises. It is true, a plea of covenants performed, under our decisions, admits the covenants to be as set out in the declaration. Steele v. McKinnie, 5 Yer. 449; Governor v. Organ, 5 Hum. 161. Under these authorities, if the plea of covenants performed stood alone, and was the only defense set up by plea of defendant, it would have been unnecessary
248 to prove the making of covenants. But this was not the only plea of the defendant. The first plea pleaded was that 'he did not undertake, agree or covenant as the plaintiff hath in its declaration alleged.' The second plea says 'he does not owe the plaintiff anything on the deed or covenants, or on account of any matters or thing whatever alleged or set forth in the declaration.' These, and other pleas of the twenty filed, negative the allegations of the declaration as to the execution of the deed and covenants sued on. Each of these separate pleas made a separate and distinct defense, and were not waived by anything set up or conceded by the legal *a*ffect of the pleading itself in any other separate and distinct plea. Defendant may plead as many pleas as he has real grounds of defense. Code No. 4628 (8). These pleas may be inconsistent—as, a defendant sued as executor may plead ne unques executor, non est factum, or a defendant sued for slander may plead not guilty, statute of limitations, and justification. Langfird v. Frey, 8 Hum. 443; Kelly v. Craig, 9 Hum. 215."

Supra, pp. 407-8.

Under this well settled rule, the burden of proof may be upon the plaintiff under some of the pleas, and upon the defendant under others.

If, as insisted by adversary counsel, the mere allegation in the plea, that the carrier had complied with the law and filed its schedule of rates with the Interstate Commerce Commission, placed the burden upon the said carrier to sustain *rhis* averment, it is clear that this would apply alone to pleas in which such averment is contained.

249 Before a plaintiff can make out his case, he must sustain the allegations of his declaration, and show affirmatively that he is entitled to recover as against each plea interposed by the defendant. An admission in one plea will not aid the plaintiff as against another plea. For instance, in slander cases, if the defendant pleads justification alone, the plaintiff is not required to prove the slanderous words averred; but if the defendant pleads not guilty in one plea and justification in another, plaintiff must prove the utterance of the slanderous words alleged in order to be entitled to recover, as against the plea of not guilty.

So, in the case at bar, the defendant in error sues for the breach of a contract, but in his suit insists that a certain provision of that contract is not binding for certain reasons therein particularly specified. It is not insisted nor intimated in the declaration that the contract is void because of the failure on the part of the carrier to file same with the Interstate Commerce Commission. Presumably, when a pleader sets up specific reasons why a contract is void he will set up all the reasons why such a contract is void.

The plaintiff in error, in the third plea, traversed the allegations of the declaration with reference to the invalidity of the contract.

In the fourth plea, the plaintiff in error traversed the allegations of the declaration with reference to the invalidity of the contract in so far as it was insisted that said contract was rendered invalid under the laws of the State of Kentucky.

The fifth plea, in express terms, traversed all the other averments of the declaration with reference to the invalidity of the contract.

250 Hence, under the allegations of the declaration and these pleas thus set out, the issue was squarely made as to whether the limited valuation clause was invalid for any of the reasons specifically pointed out in the declaration.

Neither in the declaration, nor in any of these three pleas, is the question as to whether the rate set up in the contract had been filed with the Interstate Commerce Commission made. So that, under these pleas we get back to the question of the burden of proof.

A plaintiff cannot attack the validity of a contract on certain specified grounds, and having failed to sustain any of these grounds, have the case decided in his favor on a presumption that his adversary had failed to do that which the law required him to do. We think that such a holding violates the well settled rules of pleading as well as the established rules of evidence that we have hereinbefore insisted upon.

As before stated, this question has been expressly settled in our favor in the only two federal cases in which it has been involved, so far as we have been able to find. With reference to these two cases, the Court of Appeals say:

"We do not think, the cases cited by learned counsel, to wit: Clements v. L. & N. R. R. Co. reported in 153 Fed. Rep. 980, and the case of Meeker v. Lehigh Valley Railway Co. reported in 162 Fed. Rep. 354, sustains learned counsel's contention. In the case of Clements v. R. R. Company, supra, the district judge Sammons only held that 'in the absence of a positive charge, or even of an intimation, in the petition, that the defendant has violated a statute by failing to post his tariff, he was bound to presume it

251 had done what the statute requires.' And this clearly indicates that the Court would have held that, when a charge, or even an intimation, was made that the railroad company had not complied with the statute, no such presumption arose. In Meeker v. Railway Co., supra, Mr. Justice Ray, speaking to this question, said:

"It is presumed in the absence of an averment to the contrary that every common carrier engaged in interstate commerce has complied

with the law by establishing rates, and printing filing and publishing them, and this shows that the learned Justice would hold, where it was denied that these requirements were performed, no such presumption would exist, but the burden would be upon the company to show that they had done what the law required they should do."

Opinion of Court of Appeals, p. 15.

In attem*p*ing to distinguish these cases from the case at bar, the Court falls into the error, hereinbefore indicated, with reference to the question of pleading we have just discussed, and assumes that the averments in the last three pleas have been incorp*i*rated in all these pleas.

As stated in the Clement case (153 Federal supra), there is in the declaration a total "absence of a positive charge, or even an intimation" that the plaintiff in error had violated the statute by failing to file the rate with the Interstate Commerce Commission.

252 So that, instead of distinguishing that case from the case at bar*m* the quotation from the Court of Appeals' opinion merely emphasizes the fact that it is directly applicable; and so with the quotation from the case of Meeker v. Railway (162 Federal, supra), that it is "presumed, in the absence of averments to the contrary, that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing and publishing them."

On the trial of this case under the declaration and the three pleas referred to, there is a total absence of an averment either one way or the other. Hence, we insist, that this case clearly falls within the rule announced in these two federal cases.

However, as before shown, under the pleadings and testimony in this case, it is immaterial whether this presumption be indulged for or against the plaintiff in error.

Under the well settled rulings of the Supreme Court of the United States, this agreed valuation is vaoid and enforceable.

It is entirely just and proper that this rule be enforced in this case.

Under their own testimony, the defendants in error in this case were experienced shippers. They had been shipping live stock between the same points and over the same route, as in this case, for many years. They we*ll* well acquainted with the rates and admit that they had been paying the same rate for many years. They had been signing and accepting similar bill- of lading for years. Their own testimony shows that they had every opportunity to examine the bill of lading. They knew the value of this stock, and they admit the agents of the carrier did not. There can be no pretense that there was any deceit or fraud practiced on these shippers.

They had not only been receiving the benefit of these rates

253 for years, but received the benefit of same in this particular case.

In the Croninger case the Court quoted, with approval, from the opinion in cas*e* of Hart v. Penn. R. R. Co. 112 U. S. 31, as follows:

"It is just a*b*d reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, shoul*w* be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and this in conflict with public policy, if a shipper should be allowed to reap the benefits of the contract when there is no loss, and to repudiate it in case of loss."

In Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 U. S. p. 670, the Court say:

"That the value of the cattle*d* shipped under this valuation did greatly exceed the valuation therein represented, may be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise."

In this case it is said, however*m* that the shipper did not represent anything, but merely signed the bill of lading which con-
254 tained a stipulation as to value.

In the case just cited, Mr. Justice Lurton said:

"In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract handed to him and made no declaration. But the same point was made in the Hart Case, when the Court said:

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation" the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation and that the liability should go to that extent and no further."

In the case at bar not only have the shippers who are sued, been receiving the benefit of similar contracts in the past, as well as the benefit under this contract, but they are in the anomalous attitude of suing in this case and on the very contract they are attack-
ing.

255 We therefore insist that assignments of error 6, 7, 8, 9 and 10 should be sustained, and the cause either reversed or a judgment entered in this Court for the amount of the value of said animals as set out in the bill of lading.

On the whole we submit:

(*a*) There is no liability in this case.

(*b*) If liable at all, that the plaintiff in error is only liable

for the amount of the value of the animals agreed upon and set out in the bill of lading.

Respectfully submitted,

PRITCHARD, ALLISON & LYNCH,
Attorneys for C., N. O. & T. O. Ry. Co.

256 Filed September 27, 1913. S. E. Cleage, Clerk. Jas. T. Joy, Deputy, Clerk.

No. 10.

Supreme Court of Tennessee, Knoxville, Term 1913.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
D. F. and T. C. RANKIN.

(In Error.)

Law Cause from Hamilton.

Reply Brief of Defendants in Error.

The Facts.

There was evidence tending to show, as found by the Court of Civil Appeals, that a shipment of mules was delivered to plaintiff in error, hereinafter called the carroer, by defendants in error, herein called the shippers, at Danville, Kentucky, to be transported to Atlanta, Georgia, or a point near, under the circumstances following:

First. One of the shippers notified the agent at Danville he desired to ship a number of mules to the Atlanta market. It was night, and the train on which the shipper was to leave and come in advance of the mules was soon to arrive.

The agent kept on hand a supply of blank shipping contracts and at once partially filled two of such blanks—for he did not name any rate therein—and presented to the shipper, who signed without reading and left both copies with the agent, one of them to be called for by the shipper's father next morning, which was done.

Meantime, the mules had been delivered into the carrier's stock pen. The agent did not see the mules. (R. 38.)

The shippers never read the contract, did not know of the arbitrary valuation of $75. per head inserted therein, and valuation of the stock was not even mentioned. (R. 42.)

The shippers knew of but one freight rate from Dan-
257 ville to the point in question, and had paid this rate of $95. per car uniformly for years prior. This matter was not discussed; neither were the terms of the shipping contract. (R. 38.)

Second. The Company loaded the mules in a train of 35 of 40

freight cars (R. 95) drawn by two engines—a "double header"—and while thundering through the corporate limits of Dayton, Tennessee, at "40 to 45 miles an hour" (Rec. 105) a wreck occurred.

The carrier offered evidence to show the train was running at not exceed 20 miles per hour (R. 89), but this was a controverted question, and, resolved either as the jury did at 40 miles per hour, or as the carriers now claims, at only 20 miles per hour, the fact remains that the engineer was unable to stop the train after employing all machinery and appliances to that end, under some 800 feet. (R. 95-6.)

Third. The track was headed south, and for more than a half mile north of the wreck the track was level and straight. (R. 4, 30.) The train was half a mile inside of the corporate limits of Dayton, in which there was an ordinance at the time prohibiting the running of trains at higher speed than 10 miles per hour (R. 29) and also an ordinance requiring the alarm bell constantly rung in passing crossings. There was no pretense that the bell was so rung, altho' the train was then between regular street crossings.

Fourth. There was, and for a long time had been, a rule of the carrier forbidding a greater rate of speed than 6 miles per hour in the corporate limits of Dayton, and also one requiring that trains be kept "under control" while passing through such corporate limits.

The carrier's engineer admitted he was familiar with the ordinances and rules of his Company and knew he was violating them all in running at a speed which would not permit of a
258 stop under 800 feet. (R. 93, 96).

Fifth. At the place of the wreck there was "a kind of hill or bluff on the west," a milling plant and natural elevation on the east, thus forming a kind of "cut." This extended a short distance both north and south of the wreck. There was a miniature yard to the south, extending through this cut northward. In this yard, cars were parked usually and permitted by the carrier to stand in long rows or strings.

Fourth Avenue and Second Avenue, streets of Dayton, crossed the railroad track, and people as well as cattle traversed same and could walk down between the rows of cars and, at points where they were separated, walk onto the main track between the avenues or streets, which were only 400 feet apart. (R. 84).

The track was unfenced and some cattle came on it near the wreck. The engine struck one or more of them and this caused a wreck, in which 19 of the mules in question were killed or injured, rendering them practically worthless.

There was evidence tending to show that the cattle had been travelling southward from Fourth Avenue, in plain view alongside the track, while the evidence offered by the carrier showed they had travelled between the cars from Fourth Avenue hidden from view of the engineer, and were not seen by him until they suddenly emerged from behind a string of cars. We regard this controversy of fact, however, as immaterial.

Conclusion of Fact.

From the foregoing, we insist a jury was not only well warranted in finding and inferring negligence of the carrier, but that all fair minds are forced to the same conclusion.

The Pleadings and the Burden of Proof.

The shippers complained on two counts—the first at common law, alleging a general contract of affreightment for hire
259 and a negligent breach; the second, a special written contract—exhibiting the duplicate signed and left with the agent at Danville as above—and averring a negligent breach by the carrier.

The second count attacked the valuation clause of the written contract for various reasons—among others, that the mules were really worth at least $225. per head, or more than three times the valuation fixed in the contract, and this was undisputed. (R. 36).

The carrier filed numerous pleas, but we cannot agree that it plea-s, as it now claims, "the general issue." (See Printed Brief of Carrier, pp. 4-5.)

It is true that in its first plea it "says that it is not guilty in manner and form as the plaintiff in his declaration hath alleged," but this is not a plea of the general issue in this case, which is an action ex contractu. It is no plea here. Insurance Co. vs. Thornton, 97 Tenn., 11-13.

The second plea does not deny the contract, but simply "that it breached the contract of carriage"—thereby emphasizing the existence of the contract sued on.

The 3rd, 4th and 5th pleas deny special features of the complaint, but do not deny the contract.

The 6th and 7th pleas set up that defendant is an interstate carriage, that prior to this shipment it had complied with requirements of the Interstate Commerce Act by filing schedules of its proposed freight charges between Danville and Georgian points with the Interstate Commission; that such charges were based on property valuations and were sanctioned by the Commission; that the shippers knew these facts, and, in order to avail themselves of the minimum freight rate afforded, fixed the value of their stock at $75. per head, "and represented that this amount was the just and true value of said animals." (R. 10-14.)

260 After decision by Supreme Court of the United States in the Croninger, Lata and Miller cases, the carrier obtained leave to file additional pleas and they were filed just prior to trial (R. 12-15), putting itself on record in precisely the position of the railroads in those cases. Presumably, it supposed the present shippers would do as they did in the Croninger and other cases—demur to the pleas and thereby admit the truth of them. But, instead, the shippers joined issue by record entry just before entering trial (R. 17) thus putting the burden of proof of compliance with provisions

of the Interstate Commerce Act on the carrier as a prerequisite to its enjoyment of the immunity it claims herein.

Legal Aspect of Pleadings.

We conclude and insist that under the pleadings—

(1) There is no issue as to the contract, but it is admitted because there is no plea of the general issue. Insurance Co. vs. Thornton, 97 Tenn., 11.

(2) There is no denial of the negligence averred, as there is no plea of the general issue—tho' this is not material, as negligence was fully proven. Insurance Co. vs. Thornton, 97 Tenn., 11; Caruthers' History of a Lawsuit, p. 183. Rogers vs. Kincannon, 3 Hum. 252.

(3) The burden was on the carrier to prove the matters in confession and avoidance set up in its various pleas alleging compliance with Interstate Commerce Act, by filing its schedules, approval of its freight rate by the Commission, and the shippers' valuation of their stock to obtain minimum freight rate. These matters were brought forward as affirmative defenses, and the burden of proof was on the carrier. Gaugh vs. Henderson, 2 Head, 629; Brown vs. Phelon, 2 Swan, 629; Carter vs. Turner, 5 Sneed, 179; Douglas vs. Brandon, 6 Bax., 58; Railroad vs. Horne, 106 Tenn. 76.

261 *Argument.*

I.

This is an action ex contractu and not of tort. 1 Hill. Torts, 1.

The first plea is the general issue in actions of tort, but in the present case it amounts to no plea. Insurance Co. vs. Thornton, 97 Tenn., 12.

Inasmuch as all averments not denied are admitted, it follows that the contract and negligent breach thereof averred are admitted. Hist. Law Suit, p. 183; Rogers vs. Kincannon, 2 Hum. 252.

Without an issue as to negligence, the quantum of proof with respect thereto is immaterial. At any rate there was a "breach of common law duty" in failing to deliver.

II.

If our view as to the legal aspect of the pleadings is erroneous, we respectfully submit it is immaterial as to the issue of negligence whether the carrier is presumed to have complied with the Interstate Commerce Act, as it maintains.

If it is not presumed to have so complied—for it offered no proof of compliance—then it concedes that its assignments touching proof of negligence "should be disallowed, because it clearly appearing that the injury and consequent loss complained of were not caused by the act of God nor the public enemy, the carrier was clearly liable under the common law rule." (Brief p. 9).

Now conceding, as the carrier insists, that it is presumed to have complied with the Interstate Commerce Act by filing its schedules

with the Commission, and indulging a second presumption that the Commission sanctioned a freight rate from Danville to Georgia points, based on valuations of live stock, and assuming that such rate had been inserted in the shipping contract—for it will be observed such contract contains no rate—what change, if any, results
262 as respects "the common law rule" which the carrier admits would obtain but for the Carmack Amendment. (Brief p. 9).

Looking to the decision in Express Co. vs. Croninger, 226 U. S. 491, we cannot see that the "common law duty" was changed as respect to the controversy here. It is true Mr. Justice Lurton interpreted the phrase "loss, damage or injury to such property caused by it" and there said:

"The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a common carrier."

Instead, therefore, of the Croninger decision limiting the common law liability of the present carrier, by fair inference we submit it expressly rules that, under the Carmack Amendment, a carrier is liable for any "default" in its common law duty."

The common law duty with respect to stock was the same as in cases of goods, allowing only for the propensities and characteristics of the stock, such as vicious habits, disease, etc. Railroad vs. Bank of Chicago, 123 U. S. 727-9; Covington Stock Yards vs. Keith, 139 U. S. 128-137; Goldey vs. Railroad, 30 Pa., 242; Clark vs. Railroad, 14 N. Y. 570; Porterfield vs. Humphreys, 8 Hum., 497; Evans vs. Railroad, 111 Mass., 142; McCoy vs. Railroad, 44 Ia., 424; Kimball vs. Railroad, 26 Vermont, 247; 8 Kansas, 623.

It is not insisted the propensities of the stock caused or contributed to the wreck. And as it was not caused by Providence or the public enemy, it must follow that as it was the only excuse offered for failure to deliver according to contract, the carrier breached its common law duty.

Hence*k* it was not error, in any view, for the Trial court to instruct that "the carrier is held to the highest degree of care for the safe transportation of the animals."
263 This was no stronger than the common law duty—in fact, was no*t* so str*i*ng— because the carrier was an insurer at common law, barring the exceptions before enumerated. And in the present case there is no pretense that loss was attributable to the excepted causes.

In any view, the definition of negligence and instruction by the Circuit Judge was harmless and not ground for reversal.

But if the common law duty did not burden the carrier with excusing its failure to deliver, and if the shippers were required to affirmatively prove negligence in the first instance, we earnestly insist the same result would follow.

Taking the most favorable view of the carrier, a double-header freight was plunging through the heart of Dayton, a half mile inside the corporate limits, over street crossings, at a probable speed of 45 miles per hour—certainly with such force as to prevent stopping short of 800 feet, the train drawn by two engines. It was passing

through a congested portion of the carriers' yard, along an unfenced track, with cars, according to custom, parked on side-tracks near, with at least the possibility that stock or persons would suddenly come on the track through the yards or at *cor*ssings, just as the engineer claims in the present case.

The carrier sought to excuse negligence because the stock suddenly appeared on the track. With the congested condition shown, the duty of the Company to observe its own rules requiring its operative to keep trains under control and not run in excess of 6 miles per hour through the corporate limits, was more imperative than under ordinary conditions when cars were not in the yard and the engineer could see clearly ahead and protect against a contingency that might at any time occur.

The engineer was admittedly violating the ordinances of Dayton, two rules of his Company and the Statutes of Tennessee.

264 Moreover, he was guilty of the most reckless conduct, independent of ordinance, statute or rule on the subject. Any one of the enumerated acts above well warranted the jury in finding negligence on the part of the carrier and, consequently, that the loss complained of was "caused by it." Railroad vs. Haynes, 112 Tenn., 420-1; Thompson on Negl. Vol. 5, Secs. 6576, 6578, 6600-1.

III.

The carrier insists, as the complaint did not aver specifically that it permitted its own rules violated, it was error to admit evidence on this subject. Its counsel conceded the reason for the promulgation of the carrier's rules on the subject was "the protection of property and persons on the track."

From this admission, it must result from the carrier's experience that there is less liability to collision with such "persons or property on the track" if the rules of the carrier be observed—that is, forbidding a speed of more than 6 miles per hour within the corporate limits of Dayton and requiring that the train be kept under control approaching said crossings.

Now, inasmuch as there is less liability to wreck where there is no collision than where there is one, it must follow that an observance of the carrier's rules for the protection of property and persons on the track was likewise a protection to stock or passengers on the train.

The averment of negligence was in general terms, but no exception was taken to the complaint for insufficiency, and no motion for a more specific statement.

The failure of the Company's employes to observe its rules was a strong circumstance of negligence. Where the relationship of master and servant exists, the latter may assume that the former will observe its own rules, and a failure so to do is actionable when the servant is injured as a result. Thompson on Neg. Vol. 4, Sec. 4165.

265 By parity of reasoning, when stock is received for transport it is on like assumption that the carrier will observe its rules conductive to safety. Therefore, a failure of the carrier to observe

such rules, which produces or contributes to loss of stock, is prima facie negligence and a breach of contract.

And under the general averment of negligence, proof of such breach is admissable. Transit Co. vs. Walton, 105 Tenn., 426-8; Boepple vs. Railroad, 104 Tenn., 420.

IV.

This insistence that "the negligence alleged was the violation of an ordinance of the Town of Dayton," is wholly incorrect, it will be seen that the pleadings were made up without reference to such ordinance. No exception was taken to the general allegation of negligence contained in each count. On the contrary, numerous pleas were filed to both counts.

Can it now be seriously insisted that at this stage of the pleadings the complai-ant stated no cause of action?

No explanation is offered as to why nine pleas had been filed (R. 17) several of them setting up matter in confession and avoidance. Evidently, the view of the carrier as to the merits of the complaint has materially changed since the filing of its first nine pleas, or its present contention is not altogether serious.

It is true that shortly prior to the trial, by agreement, the shippers were permitted to amend their complaint so as to add another allegation of negligence (R. 17)—violation of Dayton ordinances. This was a precaution merely. It is believed proof thereof might have been admitted under the general averment of negligence. And assuredly the additional averment that an ordinance was violated, intended to enlarge the allegations of negligence, would not have the contrary effect of so narrowing them as to exclude proof of
266 anything else. Transit Co. vs. Walton 105 Tenn. 426-8. Railroad vs. Davis, 104 Tenn., 442; Crowley vs. Railroad, 108 Tenn., 74; Boepple vs. Railroad, 104 Tenn., 420.

Admitting, for argument, that violation of the Dayton ordinance was erroneously admitted as evidence, still, the error was harmless, because the failure to deliver, as we have shown, in any view constituted a breach of the carrier's common law duty. Hence, this Court would not reverse.

Evidently, neither the Court nor jury attached much importance to the evidence on this subject, for it is not mentioned in the charge of the Court, which contains a general but correct definition of negligence. (R. 111).

Therefore, the ordinance, could not have been, as now insisted, "the ground upon which the jury decided the case."

We cannot conclude discussion of the carrier's assignment touching negligence without further reference to its insistence that under the decision in the Croninger case a carrier is now only held for negligence "caused by it."

Clearly, if the loss of these mules was not "caused by" the carrier, by what agency was it caused? Certainly not by the shippers; not by any of the causes excusing delivery at common law. Is such construction of the Cramack amendment sought as would shift

the "cause" of this wreck to the dumb cattle that were permitted, by reason of the carrier's negligence, to stay on the track?

It is our insistence that the loss, the failure to deliver these mules under the contract of the carrier was "caused by it."

V.

It results that the carrier is liable, and this presents the measure of liability.

It seems conceded that a contract executed under the
267 circumstances shown, was not binding, but was illegal as respects the valuation clause, prior to the Carmack amendment, for several reasons, a sufficient one being that the arbitrary value was not one-third the real value. Railroad vs. Smith, 123 Tenn., 678; Railroad vs Lockwood, 17 Wall., 379; Railway vs Jones, 132 Ala., 437; Railroad vs Keener, 93 Ga., 898; Railroad vs Stone, 112 Tenn., 376.

But the carrier invokes the rulings, in Express Co. vs Croninger, 226 U. S. 491 and Railway vs Harriman, 227 U. S. 657. We do not question the rulings in either of these cases, but they are not apt.

In the Croninger case, the carrier, as here, filed an affirmative plea, setting up full compliance with the Interstate Commerce Act and further that the shipper, with knowledge that the carrier's rates were based on valuations, a reasonable increase in rates obtaining in proportion as valuations increased, had knowingly valued his goods at a low price to obtain a lesser freight rate. The shipper demurred, thereby admitting the truth of the plea. It was on a state of facts pre-supposed by such pleadings that the Croninger ruling was made.

But the present is not such a case. Here, the carrier filed pleas similar to those in the Croninger case, but instead of demurring, the shippers took issue, putting the burden of evidence on the carrier. And it offered no proof in support of its pleas.

In the Harriman case it was ruled that a "shipper who values his goods for the purpose of obtaining the lower of two duly published rates, based on valuation, is estopped from recovering a greater amount than his own valuation."

It was there observed that "if he knowingly declares an undervaluation for the purpose of obtaining the lower of two published
rates, he thereby obtains an advantage and causes a discrimi-
268 nation forbidden and made unlawful by the 1st section of the Elkins' Act." There is nothing in this ruling of which we complain, and, as we see it, no comfort for the carrier in this case.

The carrier did not here put in evidence, as was done by the carrier in the Harriman case, (227 U. S. 666) the tariff on which it relied, no- did it prove that same had been filed with or sanctioned by the Commission or in any wise published.

Conceding, for the present, that publication was unnecessary, altho' averred in the pleas, yet proof of the existence of such schedules and their filing was certainly necesasry. None was offered.

The law is well settled that the burden of proof was on the car-

rier. It does not admit of argument that a special plea, or plea setting up an affirmative defense, imposes the burden of evidence on the party introducing such plea. Gaugh vs. Henderson, 2 Head., 629; Brown vs Phelon, 2 Swan, 629; Carter vs. Turner, 5 Sneed, 179; Douglas vs Brandon, 6 Baxter, 58.

It is not necessary to leave our own state for authorities in the point, but we could not expect to find cases more nearly sustaining our contention than those of Clement vs Railroad 153 Fed., 979 and Meeker vs Railroad, 162 Fed., 359, cited by the carrier.

By fair inference, in both these cases, the Courts hold the burden of evidence as to compliance with the Interstate Commerce Act, thereby affording a predicate for the validity of the $75. valuation clause, rests on the carrier.

In the Clement case, the Court said there was not "a positive charge or even an intimation that the defendant has violated the Statute by failing to post a tariff."

And in the Meeker case, the Courts presumed "in the absence of averments to the contrary, the law had been complied with."

269 Wherefore, if there had been an "Intimation in the petition" in the one or an "averment" in the other to the contrary, seemingly the burden of evidence would have been on the carrier.

Certainly where, as here, the carrier files affirmative pleas of compliance, the Courts in the cases last above would have held, as did the trial Judge in the instant case, that the burden was on the carrier.

As to intra-State traffic, the limited valuation clause, on the facts here, would certainly be invalid. Railroad vs Stone, 112 Tenn., 376-7.

To escape such liability, the carrier set up that the $75. valuation clause was valid, because of its compliance with the Interstate Commerce Act. Having so alleged, the burden of proof was on it.

To require proof of failure to obligate the shippers with the burden of evidence, would impose on them proof of a negative—proof of non-compliance by the carrier.

Again, the carrier has better facilities and greater means of knowledge than the shipper, and, having asserted a fact and then failed to produce evidence which, if its assertions were true, would be in its possession, its conduct re-acts with peculiar force against it. Brown vs Fertilizer Co., 124 Ala., 221: Cook vs Guirkum, 119 N. C. 13.

Again, if there was compliance by the carrier, as it alleges, evidence thereof is peculiarly within its control or keeping. Fisher vs Insurance Co., 124 Tenn. 487.

But the carrier argues that it is presumed to have complied with all laws, including the Act. Such a presumption will not be indulged on the facts here appearing. But if we grant the first presumption, that is, that the carrier filed schedules with the Commission, it would not follow by a second presumption based on the first, that the rate which the carrier now contends for was

270 sanctioned by the Commission nor would it be presumed that the rate was based on the particular valuation clause under

consideration. This would be resting a presumption as a presumption, contrary to our decisions. Railroad vs Lindamood, 111 Teb., 458. De Glopper vs Light Co., 123 Tenn. 633.

Apparently conclusive of this feature is the significant fact that no rate whatsoever was given to the shippers. The shipping contract accompanies the transcript, and an inspection of it will show that no rate is guaranteed. It was altogether lacking in *n*utuality, and for that reason alone is invalid. 9 Cyc. 244-5; 39 Cyc. 686; Clark vs Snall, 6 Yer., 432.

While it is true, as a general proposition, that parties are presumed to observe the law and are presumed innocent until the contrary appears, it is equally true that when a litigant claims a privilege or immunity by reason of special facts averred, the burden of proving such facts rests on the party so averring.

In the absence of all proof by the carrier in support of its pleas, the action of the Trial and Appellate Courts was correct and we earnestly ask an affirmance.

Respectfully submitted,

W. B. MILLER,
Attorney for Appellees.

CHAS. C. FOX,
Of Counsel.

271 Filed July 14, 1913. S. E. Cleage, Clerk. Jas T. Joy, Deputy Clerk.

No. 11.

In the Court of Civil Appeals, Knoxville, Tennessee.

No. 23. Hamilton County. Law.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
D. F. RANKIN and T. C. RANKIN, Defedants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

The Negligence and Liability of the Company.

The facts in the case shows that at the time the wreck occurred that resulted in the death of a number of mules belonging to the defendants in error and the damage to the residue of said mules, that the double header freight which was transporting said mules South was going at a rate of from twenty to forty miles an hour, according to the proof, through the town of *Day of* Dayton, Tennessee, and that the wreck occurred in the town of Dayton between Fourth and Second Avenue- of said town.

This suit by defendants in error is a suit for the negligence and

carelessness of the Railroad Company, and it is not a suit for the violation of any Ordinance or any rule of the Company or Statute of Tennessee.

272 It is true that in going at the rate of twenty miles an hour through the town of Dayton, Tennessee, the Company did violate the Ordinance of Dayton, the Statute of this State and also the rule of the company on the subject, but these facts are mere evidences of negligence.

The primal question in the case is the negligence of the defendant Company in the operation of its train which resulted in the damage *of* the defendant- in error.

Supposing merely for the sake of argument that there was no Ordinance of Dayton on the subject, no rule of the Company on the subject, and no statute of this State on the subject, would that in any degree change the question of the negligence of the Company in the case?

The Company in this case being common carriers of live stock, are, under the law, insurers of the safe delivery of said stock, except where the loss or damage occurs by the act of God or the common public enemy. In some States a further exception is made where the loss or damage is due to the inherent nature or defect of the animals themselves. And even putting this exception in this case, it does not change in any respect the law of this case of the liability of the Company, for the proof is conclusive that this loss and damage was not due to the act of God or the act of the public enemy or to the inherent nature of the animals themselves, but, as shown by the record, it was due solely and alone to the manner and way their train was operated at the time of the accident, and the Company not having brought itself within any of the exceptions laid down by the law, it is clearly liable for this damage, regardless of the fact that they were operating the train at the time in the violation of an ordinance of the town of Dayton, of the rule of the Company and

273 of the Statute of this State.

It may be true that the ordinance of Dayton and the rule of the Company and the Statute of this State were passed primarily for the protection of the people on the highway or crossing the track of the railroad, but that does not change the fact that if the Company in the operation of its train was guilty of negligence and also in the violation of an Ordinance or a statute or a rule of the Company, and this results in damages to stock, then in charge of the Company, that they will be liable for this damage.

The claim of the defendants in error, plaintiffs below, is based solely and alone upon the negligence and carelessness of the Company, and the defendants in error had a right to show as an evidence of this negligence and carelessness that they violated the Ordinance of Dayton, rules of the Company on the subject and the Statute of this State.

Illegality of the Contract.

Considerable space in the Brief for the plaintiff in error is devoted to the discussion of the question of the illegality of the contract in this case.

The defendant- in error sets up this contract and sues upon it, and in no way attacks its legality, and in no way attempts to plead illegality as to said contract, except in the mere question of limiting the liability of the Company to $75.00 per head for the stock mentioned in the contract.

There is nothing in the pleadings and nothing in the proof
274 on the part of the defendants in error attempting to impeach this contract in any way or in any form, except in the one single provision as to the amount of recovery per head for the stock, and we think that an analysis of the authorities cited by the plaintiff in error on this point go- to the question as to where the contract of this State, and we think of practically all the States of the Union, the attempt upon the part of the Company to limit their liability in the case of loss to one-half, one-third or one-fourth of the actual value of the stock has been declared to be illegal, and it is this illegal feature alone of this contract that the defendants in error have attempted to attack, and the only things that would save the contract in this illegal feature would be the fact that the Company had brought itself within the provision of the Interstate Commerce Law, and that the minds of the parties in making this contract had met and that the contract was fairly made; and so we now wish to briefly discuss

The Interstate Commerce Law.

It is true that this was an interstate shipment, but the Company in this case has been making interstate shipments since 1877 and long prior to the enactment of the Interstate Commerce Law, and whether or not this shipment came within the provision of the Interstate Commerce Law depends solely and alone as to whether the Company had complied with that law, and had filed with the
275 Interstate Commerce Commission its schedule or tariff of rates, governing the shipment of stock from Danville, Kentucky, to Atlanta, Georgia, and whether or not those rates so filed with the Commission were the same as pleased in this case. The defendant- in error, the plaintiff- below, joined issue with the company on both these questions. In other words, the defendant- in error expressly denied that they had ever filed any schedule or tariff rate with the Commerce Commission or that such rate was the tariff rate, pleaded by the Company in this case.

The Company made no proof, whatever, on the subject and wanted the Lower Court, and want this Court to presume not only that they filed tariff rates with the Interstate Commerce Commission, but that they actually filed the tariff rates that were pleaded in this case. Or, in other words, they want the Court to indulge in two presumptions in favor of the Company. The first presumption would be that they had filed rates with the Interstate Commerce Commission, and the second presumption that they had filed the very rates which they claim in the pleadings in this case that they did file.

Even if this Court could go so far as to presume even after an issue is made on the subject and no proof filed, that the Company

had filed a schedule of rates with the Interstate Commerce Commission, could it also go far enough to presume that those schedule rates were the same as pleaded in this case. We think we have very clearly shown that the law does not go that far.

It was a very easy matter for the Company to introduce proof on this subject, for the Interstate Commerce law provides that
276 the only proof necessary is a certified copy of the schedule or tariff rate filed by the Company with the Commission, signed by the Secretary of the Commission under his seal, and so it was a very small matter for the Company to have made this proof, if they could have made it, and there must have been some reason why they did not do it, but they come now and want this Court to presume that they did *no* something which we have denied that they did, and of all of which they could have easily made proof, if it was true.

We respectfully ask that the case be affirmed.

CHAS. C. FOX,
W. B. MILLER,
Attorneys for Defendants in Error.

Copy mailed adverse counsel on July 12, 1913.
W. B. MILLER.

277 Filed September 26, 1913. S. E. Cleage, Clerk.

In the Supreme Court, at Knoxville, Tennessee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
D. C. and T. C. RANKIN, Defendants in Error.

Supplemental Brief for Cincinnati, New Orleans & Texas Pacific Railway Company.

May it please the Court:

All the matters discussed in the reply brief of the attorneys for def-*d*nants in error, D. F. and T. C. Rankin, have *n*een fully discussed in our printed brief and argument, except with reference to the discussion of the sufficiency of the pleas of the general issue.

On page 6 of the brief of the attorneys for defendants in error, they insist that the general issue has not been properly pleaded in this case, and cite as authority the case *if* Insurance Company v. Thornton, 97 Tennessee, page 11.

We think the learned attorneys answer their own argument. In the first place, they say that the suit is one for breach of contract, and therefore the plea of not guilty is not proper.

278 Assuming this to be true, and assuming that the suit was one strictly for breach of contract, in that event the proper plea was simply a denial that the defendant Railway Company did breach the contract in the manner alledged in the declaration.

This is Exactly what the Second Plea Was.

In other words, if the suit is based on the theory that the defendant wrongfully injured plaintiffs' stock, then a plea of not guilty was proper, and such plea was filed.

If, on the other hand, it was, as stated, a suit strictly for breach of contract, then a plea denying this breach was a proper one, and such a plea was filed.

Of course the execution of the contract was not denied by any plea. The contract was exhibited with the declaration. Its execution was not denied, and is not now denied. We are simply insisting that the contract was valid in all its parts.

Respectfully submitted,

PRITCHARD, ALLISON & LYNCH,
Att'ys for C., N. O. & T. P. Ry.

279 No. 12.

Supreme Court of Tennessee, at Knoxville, September Term, 1913,
Saturday, November 29, 1913.

Court met pursuant to adjournment.

Present and Presiding:

The Hon. Chief Justice M. M. Neil and the Hon. Associate Justices D. L. Lansden, Grafton Green, Arthur S. Buchanan, and Samuel C. Williams.

The minutes of Monday November 24, were read and signed when the following proceedings were had, to-wit:

C., N. O. & T. P. Ry. Co.
vs.
D. F. and T. C. Rankin.

Affirmed.

This case came on to be heard on the transcript of the record from the Circuit Court of Hamilton County, opinion and judgment of the Court of Civil Appeals, petition for certiorari and supersedeas, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion and so orders and adjudges that there is no reversible error in the judgment of the Court of Civil Appeals and said judgment is in all things affirmed.

It is accordingly ordered and adjudged by the Court that the def'ts in error D. F. and T. C. Rankin have and recover of plaintiff in error C. N. O. & T. P. Ry. Co., the sum of $4,508.82 and the cost of the case; and that they also have and recover of said plaintiff in error and M. M. Allison and J. J. Lynch sureties on its appeal

bond to the Court of Civil Appeals and its sureties for supersedeas to this court the further sum of $204.45 damages, said amount being the interest on the above recovery in the Court of Civil Appeals and in this Court from the date of the judgment in the Court below, to-wit, March 1, 1913, to this date November 29, 1913, together with all of the cost of the appeal for all of which execution is awarded.

On motion of W. B. Miller attorney for defendants in error a lien on the above recovery for his reasonable attorney fee is hereby declared and allowed.

280 Office of the Clerk of the Supreme Court for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court do hereby certify that the foregoing is a true, perfect and complete copy of the transcript of the record in the case Cincinnati, New Orleans and Texas Pacific Railway Company versus D. F. & C. T. Rankin, lately pending in said Court, and as the same was certified by Charles L. Hayes, Clerk of the Circuit Court of Hamilton County, at Chattanooga, Tennessee, and including therein copy of the original Bill of Lading, and of the following papers in connection therewith:

(1.) Assignments of error and brief of Cincinnati, New Orleans and Texas Pacific Railway Company to the judgment of the Circuit Court of Hamilton County.

(2.) Reply brief of D. F. & C. T. Rankin.

(3.) Opinion of Court of Civil Appeals.

(4.) Judgment of the Court of Civil Appeals.

(5.) Petition of Cincinnati, New Orleans and Texas Pacific Railway Company for writs of certiorari and supersedeas.

(6.) Writ of Certiorari.

(7.) Bond for Supersedeas.

(8.) Writ of Supersedeas.

(9.) Assignment of Errors brief and argument of Cincinnati, New Orleans and Texas Pacific Railway Company.

(10.) Reply Brief of D. F. & C. T. Rankin.

(11.) Supplemental Brief for C. N. O. & T. P. Ry. Co.

(12.) Judgment of Supreme Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Knoxville, Tennessee, on this the 6th day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk of Supreme Court of Tennessee.

COPY BOUND TO

281 Filed December 31, 1913. S. E. Cleage, Clerk.

In the Supreme Court of the State of Tennessee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
D. F. and T. C. RANKIN, Defendants in Error.

The Petition of the Cincinnati, New Orleans & Texas Pacific Railway Company.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

Now comes the said petitioner, the Cincinnati, New Orleans & Texas Pacific Railway Company, the above named appellant and plaintiff in error, and complains and shows the Court:

That, heretofore, to-wit, on the 22nd day of April, 1912, the defendants in error, D. F. and T. C. Rankin, brought suit against petitioner, the Cincinnati, New Orleans & Texas Pacific Railway Company, in the Circuit Court of Hamilton County, Tennessee, at Chattanooga, Tennessee, for damages in the sum of Five Thousand Dollars.

On August 23, 1912, the said D. F. and T. C. Rankin filed their declaration in the said cause. Said declaration contained two counts. The first count averred that on or about the 6th day of November, 1911, the said defendants in error, through D. F.
282 Rankin, delivered to the petitioner, said Railway Company, in good condition, nineteen mules, to be transported by the said petitioner, Railway Company, from Danville, Ky., to Atlanta, Ga.

The declaration averred that said petitioner, Railway Company, was a common carrier, operating a line of railway over which it transported freight for hire. The declaration averred that the said shippers agreed "to pay the full freight or tariff charged by defendant (railway company) for such transportation, on delivery of said mules at the point of destination; the defendants accepted said mules for transportation on the terms aforesaid, and agreed and became bound to safely transport and deliver them in the same sound condition in which they were received at the place aforesaid."

It was then averred that the said Railway Company failed to deliver said mules at the point of destination as agreed, and instead wrongfully and negligently failed and refused to do so, and negligently wounded, maimed, bruised and killed all, or a portion of said mules, and failed and refused to deliver same. It was alleged that said mules were reasonably worth $250.00 each, the injuries to all of which amounted to $4750.00.

The second count in the declaration contains the same allegation as to the value of the mules injured, and the delivery of the same to the petitioner, Railway Company. It was further alleged

TO CLOSE IN CENTER

that said Railway Company contracted to transport said mules from Danville, Ky., a station on said Company's line of railway, over its own line to Chattanooga, Tenn., and there deliver same to a connecting carrier to be transported to Atlanta, Ga., for delivery to the said D. F. and T. C. Rankin.

283 The declaration further averred that "said D. F. Rankin agreed to pay the full freight tariff demanded by the defendant for transportation, upon delivery of the said mules and horses at destination." This count in the declaration averred further that "the defendant executed and delivered to D. F. Rankin a receipt, or Bill of Lading, copy of which is here to the Court shown, being filed as Exhibit No. 1 hereto, in which defendant acknowledged the receipt of said mules and horses for transportation, and delivery to said plaintiff, and in and by which defendant undertook and attempted to stipulate that in case of loss or damage to said stock, defendant should not be liable for more than $75. for each animal. Said limitation was not called to the attention of either of plaintiffs, and neither of them assented to or knew of the same; and they aver that the whole of said paper, and especially the $75. limitation, is void and of no effect and is not operative or binding on them or either of them, for the following, among other, reasons:

"1. Because said contract of shipment was made in the State of Kentucky, and the rights of the parties thereto are to be measured and controlled by the laws of said State; and under the constitution, laws and decisions of the Courts of Kentucky, the said stipulation, undertaking to limit the liability of the carrier to less than the actual value of the property is contrary to public policy and absolute void: hence plaintiffs are not bound thereby.

"2. Independent of the Constitution, laws and decisions of Kentucky, such limitation, in order to be valid or effective, must be reasonable; and the said stipulation in the bill of lading

284 in this case is grossly unreasonable and unjust, in that it undertakes to fix and limit the value of all horses and mules, without discrimination or distinction, at 'not exceeding $75. each'; whereas, the mules belonging to and shipped by the plaintiffs, as aforesaid, were worth at least three or more times as much as $75. each.

"3. No other contract of transportation was mentioned or offered to plaintiffs, nor did they or either of them have any knowledge or information that the shipment was to be made at a reduced rate and under a stipulation for limited liability, nor was any option given to ship either under a common law contract, without limitation on the amount of liability, or under the contract as actually delivered; nor was any option whatsoever offered them or brought to the attention of them or either of them.

"4. There was no consideration whatever to sustain said limited liability stipulation.

"5. The defendant and plaintiffs were not on the same or an equal footing, in that defendant, together with its connecting carriers, owned the only direct line of railway from Danville, Kentucky, the home of plaintiffs, where said stock then was, to Atlanta,

Georgia, and could practically dictate terms to plaintiff in the matter of transportation.

"The statement in said exhibit 1 'That the published freight rates on live stock of said carrier are in all cases based upon the
285 following maximum valuation-, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for', plaintiffs are advised is wholly untrue and same was not brought to their attention, nor was it assented to by them.

"The further statement or recital therein 'that the tariff regulations of said carrier provide that for every increase of 100 per cent or fraction thereof in the above valuations there shall be an increase of 50 per cent. in the freight rate', as plaintiffs are advised and charge, was and is wholly untrue.

"The recitals aforesaid appear in item 3 of said Exhibit 1, and plaintiffs charge that they are unjust, untruthful, discriminatory, arbitrary and unreasonable.

"Wherefore, plaintiffs aver that said item 3 aforesaid, and especially the valuation of $75.00 therein, are absolutely void."

The said Bill of Lading filed as Exhibit 1 to the declaration, contains the following stipulations:

2. *Carrier's Liability on His Own Line Only.*

"It is understood and agreed by said shipper that said carrier's liability extends to the destination of said stock only when said destination is on the line of the C., N. O. & T. P. Ry.; otherwise such liability extends only to the station where said live stock is to be received by connecting carrier for transportation to or toward destination, and said carrier's liability shall cease when said live stock is ready to be delivered to owner or consignee, or to
286 connecting carrier whose line may constitute a part of the route to destination.

3. *Limit of Value.*

That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz.:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit on the freight rates will admit of the carrier assuming responsibility for:

Stallions or Jacks, not exceeding	$150.00	each
Horses or mules, not exceeding	75.00	
Mare and colt together, not exceeding	100.00	
Ponies, not exceeding	40.00	
Cattle, except yearlings, not exceeding	30.00	
Cow and calf together, not exceeding	35.00	
Yearling Cattle, not exceeding	20.00	
Hogs, Pigs, Calves, Sheep or Lambs, not exceeding	5.00	each
Turkeys, not exceeding	1.50	doz.
Geese, not exceeding	1.00	"
Chickens, Ducks, or Guinea Fowls, not exceeding	.75	"

That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase of fifty per cent. in the freight rate; and

That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment,
287 nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for.

4. *Guaranteed Freight Rate.*

That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations is $— per — from — to — and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc."

(Defendants in error D. F. & T. C. Rankin each testified that said freight rate was $95 per car.)

Afterwards, the said defendants in error, D F. and T. C. Rankin, amended their declaration so as to allege specifically that the mules in question were injured and killed in a wreck in the town of Dayton while the train was being operated in violation of a municipal ordinance of said town, which required that the train should not be operated at a greater rate of speed than that permitted by said ordinance, and that the mules were killed as a result of this negligence.

Said petitioner, Railway Company, filed nine pleas, as follows:

"I.

"The defendant Cincinnati, New Orleans & Texas Pacific Railway Company for plea to the plaintiff's declaration says that it is not guilty in manner and form as the plaintiff in his declaration hath alleged.

"II.

"For further plea defendant says that it did not breach
288 the contract of carriage, as the plaintiff in his declaration hath alleged.

"III.

"For further plea defendant denies that any part of the contract of shipment filed as Exhibit "A" to the plaintiff's declaration is void for any reason, but says that said contract is valid and binding and pleads the same as a complete bar to plaintiff's right to recover in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment.

"IV.

"To so much of said declaration as avers that the contract, Exhibit "A" to plaintiff's declaration, is void and of no effect for the reason that said contract was made in the State of Kentucky and that under the Constitution, laws and decisions of the court of Kentucky the stipulation containing the limited valuation clause is invalid, the defendant for plea says;

(*a*) That the contract exhibited with the plaintiff's declaration shows that the contract was not to be wholly performed in the State of Kentucky, but was to be partly performed in the States of Tennessee and Georgia; that the injury complained of occurred in in the State of Tennessee, and therefore the Constitution and laws of Kentucky would not govern, and the rights of the parties under the contract are not to be determined by the Constitution and laws of Kentucky.

(*b*) That the contract for the breach of which recovery
289 is sought is an interstate contract, providing for the shipment of live stock from Danville, a point in the State of Kentucky, to Atlanta, a point in the State of Georgia: that the validity of said contract is not governed by the Constitution or laws of the State of Kentucky, and that said contract is valid and binding upon plaintiff and defendant, and defendant relies upon the conditions thereof as a complete bar to any recovery in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment.

"V.

"For further plea to so much and such parts of the plaintiff's declaration as charge that the contract filed as Exhibit "A" to plaintiff's declaration is invalid because (*a*) the contract is unreasonable; (*b*) no other contract of transportation was offer- to plaintiff, or no option given to plaintiff to ship under a common law contract without limitation on the amount of liability; (*c*) that there was no consideration to sustain the limited liability stipulated in the contract; and (*b*) that the plaintiff did not assent to the terms of said contract, defendant says that said contract is not invalid for these or any other reasons, but the same is valid and binding, having been entered into freely and knowingly by the plaintiff; the plaintiff having at the time said contract was entered into the option of shipping said stock under the contract executed, which is filed
290 as Exhibit "A" to plaintiff's declaration, or under a contract of common law liability at a higher freight rate, which was also reasonable.

"VI.

"Defendant for further plea says that it is a common carrier, subject to the provisions of the Act of Congress regulating interstate commerce approved February 4, 1997, and the amendments thereto; that prior to the shipment of horses and mules as set out in plaintiff's declaration it had duly filed in the office of the Interstate Commerce Commission, as required by said Act of Congress, schedules of joint

rates showing the rates and charges for transportation of live stock between different points on its own road, and between points on its own road and points on connecting roads between Danville, a point in the State of Kentucky, and Atlanta, a point in the State of Georgia, and had printed and kept open to the public inspection at Danville such schedules showing the rates and charges for transportation of live stock, including horses and mules, between Danville, Kentucky, and Atlanta, Georgia; that said schedules contained the classification of freight in force and stated separately all the terminal and other charges, as required by said Act of Congress, and the rules and regulations of the Interstate Commerce Commission, which provided that the freight rate in carload lots upon horses and mules from Danville, Kentucky, to Atlanta, Georgia, where the value of said horses and mules did not exceed $75.00 each should be
291 $95.00 per car, and that said regulations also provided that for every increase of 100 per cent. or fraction thereof in said valuations there should be an increase of 50 per cent. in the freight rate. Plaintiff knowing these facts and in order to avail himself of said minimum freight rate of $95.00 fixed the value of each of said mules so shipped by him at $75.00 and represented to defendant that this amount was the just and true value of said animals. The defendant had no knowledge or means of knowing as to the value of said animals except as the same was derived from the plaintiff or his agent; and plaintiff is now estopped from denying that said valuation as thus fixed by him and upon which he obtained said minimum freight rate is unjust or unreasonable, and if liable for any amount defendant pleads these facts as a bar to any recovery in excess of $75.00 or each mule so injured in said shipment.

"VII.

"Defendant for further plea says the contract of shipment for breach of which recovery is sought was a contract for the shipment of mules from Danville, a point in the State of Kentucky, to Atlanta, a point in the State of Georgia. The schedule of freight rates in effect at the time of said contract was made *made* from Danville, Kentucky, to Atlanta, Georgia, in proper form had been filed with the Interstate Commerce Commission as provided by law prior to the time of these shipments, showing that the rates therein men-
292 tioned were based upon the valuation of not exceeding $75.00 for each mule or horse, and that the shipper is required to declare the value, and when the value so declared is in excess of $75.00 per head an additional charge is made as provided in the classification which is a part of said schedule. Said schedule and the tariff regulations, approved by said Interstate Commerce Commission and in effect at the time, provided that for every increase of 100 per cent or fraction thereof in said values there should be an increase of 50 per cent. in the freight rate. The rate charged on this shipment was based upon the valuation of $75.00 for each mule, as declared by plaintiff. Defendant had no knowledge of the actual value of said mules, nor any means of knowing the true value of the same, but relied entirely upon the value declared by the plaintiff in said

contract; and the defendant for plea says that the actual value of said stock was more than $75.00 the plaintiff has been guilty of a wilful violation of the Act of Congress regulating interstate commerce by fraudulently obtaining transportation of said mules at an illegal rate through the suppression of information as to the true value thereof, and that the law will not lend its aid to enforce a demand having its origin in the breach of the law itself.

"VIII.

293 "For further plea to so much and such parts of the plaintiff's declaration which alleges 'that the defendant sold all of said mules which had not been killed, and appropriated and converted the proceeds of sale and still retains and has never accounted for the same,' this defendant says that it did sell said animals at public outcry to the highest and best bidder for cash, and received therefor the sum of $867.66 after deducting the necessary expenses of said sale and keep of said mules until the sale could be properly advertised, which amount defendant tendered to the plaintiff and here and now tenders into court in full settlement of plaintiffs' demand. Defendant was forced to sell said mules for the following reasons:

"The car in which said mules were being shipped was derailed at Dayton, Tennessee, without any fault on the part of the defendant. (Some of said mules were killed, for which defendant admits liability to the extent of the agreed valuation fixed in the contract filed as Exhibit No. 1 to plaintiffs' declaration, namely, $75.00 per head). Other mules were injured, and where the injury amounts to so much, defendant admits liability to the extent of the agreed valuation fixed in said contract, namely $75.00 each. A part of said mules were, if injured at all, so slightly injured as not to affect their value and for which plaintiffs sustained no damage. Immediately after said derailment defendant procured the services of a veterinary surgeon at Dayton, Tennessee, and had the injured mules properly treated and all of them properly cared for. Plaintiffs were promptly
294 notified by defendant of the accident and said mules were tendered to the plaintiffs and the plaintiffs urged to receive them without prejudice to any claim they might have against the defendant for all the mules that had been killed and for all the mules that had been injured. Whereupon the plaintiffs declined to receive any of said mules, either the ones which were injured or those not injured. Whereupon defendant requested plaintiffs for instructions as to what disposition to make of said stock, which plaintiffs declined to give. Defendant, thereupon, after duly advertising said sale, sold said mules for plaintiffs to the best advantage to the highest bidder for cash, realizing therefor, after deducting the cost of said sale and of keeping said mules to the date of said sale, the sum of $867.66.

"Defendant therefore denies that it converted any of said mules to its own use and denies liability in any amount for damage to any of said mules that were not injured, and denies liability for the ones that were killed or injured in excess of the limited valuation stipulated in the contract of shipment.

"IX.

For further plea defendant says that it is a common carrier engaged in interstate commerce within the provisions of the Act of Congress of February 4, 1887, as amended by the Act of June 29, 1906; that in obedience to said Act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges
295 from Danville, Ky., to Atlanta, Ga., which schedules, approved by said Interstate Commerce Commission, showed that the rates and charges on a carload of mules and horses from Danville, Ky., to Atlanta, Ga., when the value of said horses and mules did not exceed $75.00 each, was $95.00 per car, and further provided that for every increase of one hundred per cent or fraction thereof in said value there should be an increase of fifty per cent. in the freight rate. Plaintiffs, prior to and at the time said shipment was made from Danville, Ky., to Atlanta, Ga., knew that the freight rate was based upon the value of the horses and mules so shipped and that the defendant stood ready to ship said stock at an increased valuation at an increased freight rate, and knowing this fact the plaintiffs declared the valuation of said horses and mules to be $75.00 per head and thereby obtained the cheaper freight rate of $95.00 per car. The receipt or bill of lading issued to plaintiffs by defendant placed a value upon the horses and mules for $75.00 each and was signed by the shipper. In addition to reciting the provisions for increase in freight rate for each increase of one hundred per cent or fraction thereof in the valuation, the bill of lading further provides 'that the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor
296 for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals unless an additional amount is herein stated and paid for,' which contract, with all the provisions thereof, is valid and binding upon the plaintiffs and the defendant when applied to interstate shipments which are governed by the Acts of Congress of February 4, 1887, and June 29, 1906, and defendant pleads and relies upon the same as a complete bar to any recovery (in excess of $75.00 for such mules) as were actually killed and such ones as were actually damaged to the amount of $75.00."

The case was tried in the Circuit Court at Chattanooga, Tennessee, at the January Term 1913 (on the 1st day of March, 1913), and a verdict and judgment rendered in favor of the said D. F. and T. C. Rankin and against the said petitioner, Railway Company, principal and interest, amounting to $4508.82.

Said petitioner, Railway Company, filed a motion for new trial upon the following grounds:

"1. Because the verdict was excessive in this that the value of the mules shipped had been fixed by agreement between the plaintiff and the defendant, at the time they were received by the defendant for shipment, at $75.00 for each mule as set out in the bill

of lading exhibited with the declaration in this case; and this at most was all plaintiff was entitled to recover, if anything.

"2. The Court was in error in holding that the burden
297 of proof was upon the defendant Railway Company to show affirmatively that it had complied with the provisions of the Interstate Commerce Act requiring the filing of its rates with the Interstate Commerce Commission.

"3. The Court was in error in charging the jury as follows:

'It follows therefore that under the facts in this case the undisputed facts and the decisions of our courts on this subject, that the Court is of the opinion that the contract in this case is invalid and the question goes to the jury as to the negligence of the defendant on this shipment of stock.'

"4. The Court was in error in permitting the plaintiff to testify, over the objection of counsel for defendant, that he did not read the bill of lading and did not know its terms at the time he signed same.

"5. The Court was in error in declining to permit the witness M. L. Hartman to testify that he was running his train at the time of the accident at the customary rate of speed in towns the size of Dayton.

"6. The Court erred in declining to permit the same witness Hartman to testify that the engineers of the defendant Company habitually ran their trains at the rate of speed at which he was running the train on the day of the accident through Dayton and other towns of like size.

"7. The Court erred in declining to permit the witness Hartman to testify in effect, from his experience, that he was not
298 running the train at a dangerous rate of speed at the time of the accident.

"8. The Court erred in charging the jury as follows:

'If you find from the proof in this case that the plaintiff did deliver in good condition 19 mules to the defendant to be transported to Atlanta, Ga., and that there was an accident, a collision on the railroad, then the burden is upon the railroad company to show that it has not been guilty of such negligence.

If the Railway Company fails to show its freedom from negligence, then the plaintiff is entitled to recover for the value of the stock delivered.'

"9. The Court erred in permitting the proof of the Dayton ordinance to go to the jury because there was no proof to show that said ordinance has been legally and properly adopted.

"10. The Court erred in permitting the proof of the rules of the Company, with reference to the rate of speed at which trains should run through the town of Dayton to be introduced because neither the existence or breadth of such rules is alleged in the declaration; and further, because it was shown and admitted that these rules were adopted for the protection of persons and animals in the town of Dayton and not for the protection of freight or passengers being carried by the defendant's trains.

"11. The Court erred in charging the jury as follows:

299 'Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals. Take the case.'

"12. The Court was in error in charging the jury that plaintiff was entitled to recover the value of the mules at the place of their destination.

"13. Plaintiff was not entitled to recover anything in this case because he did not show that he had either paid or offered to pay the legal freight rate for the shipment of said mules from Danville, Kentucky, to Atlanta, Georgia.

"14. Plaintiff is not entitled to recover anything in this case because the evidence affirmatively shows that the mules were injured through no negligence on the part of the defendant Company, but from an unavoidable accident.

"15. The verdict should be set aside because there is no evidence to support it."

This motion was overruled, to which action of the Court, defendant excepted, and prayed and was granted an appeal in the nature of a Writ of Error to the Court of Civil Appeals of the State of Tennessee. A bill of exceptions was filed and proper bond given, and the appeal perfected as required by law and the rules of the Court.

In the Court of Civil Appeals, your petitioner filed a proper brief, assignment of errors, and argument, as required by the rules of the Court: The Assignment of Errors was as follows:

300 "(1.) Because there is no evidence to sustain the verdict of the jury or the judgment of the Court for any amount, the testimony conclusively showing that the injury to the stock of the defendants in error was caused by an unforeseen accident over which the plaintiff in error had no control and which its agents and employes could not have avoided in the exercise of proper care.

"(2.) Because the Circuit Court erred in charging the jury as follows:

'Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals.'

"(3.) The Court erred in permitting the proof of the rules of the Company with reference to the rate of speed at which the train should be run through the town of Dayton to be introduced, because neither the existence nor breach of such rules is alleged in the declaration, and, further, because it was shown and admitted that these rules were adopted for the protection of animals and persons in the Town of Dayton and not for the protection of freight being carried by the railway company.

"(4.) The Court erred in permitting the proof of the ordinance of the municipality of Dayton to go to the jury, because there was no proof to show that said ordinance was legally and properly adopted.

301 "(5.) The Court erred in declining to permit witness Hartman (the engineer) to testify that he was running the train at the time of the accident at the rate of speed at which such trains were usually and customarily run in Dayton and towns of like size, and that he was not running the train at a dangerous rate of speed at the time of the accident.

"(6.) The Court erred in holding that as a matter of law the limited valuation clause was invalid, and in instructing the jury that if the defendants in error were entitled to recover, they were entitled to recover the full value of the property.

"(7.) The Court was in error in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the requirements of the Interstate Commerce Act in filing its rates with the Interstate Commerce Commission.

"(8.) The Court erred in declining to sustain the limited valuation clause set out in the bill of lading.

"(9.) The Court erred in permitting testimony to go to the jury as to the value of the mules, because this value was fixed by the terms of the contract at $75.00 for each mule.

"(10.) The Court erred in permitting the defendants in error to testify that they did not read the bill of lading and did not know it contained a limited valuation clause."

302 The case was heard in said Court of Civil Appeals, and, on July 19, 1913, a decree was entered affirming the judgment of the Circuit Court, and rendering judgment against the petitioner and in favor of the defendants in error, D. F. and T. C. Rankin, for the amount of the judgment in the Circuit Court, together with interest thereon.

After giving the notice required by the rules the Supreme Court of the State of Tennessee, within the time required by the rules of the said Supreme Court and the statute of this State, your petitioner filed in said Supreme Court a petition for certiorari and supersedeas, accompanied by assignment of errors, brief and argument, as required by law and the rules of said Court.

On the 2nd day of September, 1913, the petition for certiorari and supersedias was granted by one of the honorable Judges of said Supreme Court of the State of Tennessee, proper bond was given and said writs issued.

The assignment of errors filed by petitioner in said Supreme Court was as follows:

303 "(1) Because there is no evidence to sustain the verdict of the jury or the judgment of the Court for any amount, the testimony conclusively showing that the injury to the stock of the defendants in error was caused by an unforeseen accident over which the plaintiff in error had no control, and which its agents and employes could not have avoided in the exercise of proper care.

"In the exercise of the power conferred by the Commerce Clause of the Constitution of the United States (Art. 1, Sec. 8), the Congress of the United States on June 29, 1906., passed an act known as the Carmack amendment to the Interstate Commerce Act, pro-

viding that carriers of Interstate freight should be liable only for injuries to freight 'caused by it.' In holding the plaintiff in error liable in this case the Court failed to give effect to this provision of the Constitution and laws of the United States.

"(2) Because the Circuit Court erred in charging the jury as follows:

'Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals.'

"(3) The Circuit Court erred in permitting the proof of the rules of the company with reference to the rate of speed at which the train should be run through the town of Dayton to be introduced, because neither the existence nor breach of such rules is al-
304 leged in the declaration, and, further, because it was shown and admitted that these rules were adopted for the protection of persons and animals and not freight being carried by the Railway Company.

"(4) The Circuit Court erred in permitting the proof of the ordinance of the municipality of Dayton to go to the jury, because there was no proof to show that said ordinance was legally and properly adopted.

"(5) The Circuit Court erred in declining to permit witness Hartman (the engineer) to testify that he was running the train at the time of the accident at the rate of speed at which such trains were usually and customarily run in Dayton and towns of like size, and that he was not running the train at a dangerous rate of speed at the time of the accident.

"(6) The Circuit Court erred in holding that as a matter of law the limited valuation clause was invalid, and in instructing the jury that if the defendants in error were entitled to recover, they were entitled to recover the full value of the property.

"This is contrary to the provisions of the Interstate Commerce Act, known as the Carmack Amendments, passed June 29, 1906, and published in 34 Stats. at Large, 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288, and violative of the Commerce Clause of the Constitution of the United States.

"(7) The Court was in error in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the requirements of the Interstate Commerce
305 Act in filing its rates with the Interstate Commerce Commission.

"(8) The Circuit Court erred in declining to sustain the limited valuation clause set out in the bill of lading.

"(9) The Circuit Court erred in permitting testimony to go to the jury as to the value of the mules, because this value was fixed by the terms of the contract at $75.00 for each mule.

"(10) The Circuit Court erred in permitting the defendants in error to testify that they did not read the bill of lading and did not know it contained a limited valuation clause."

The case was decided by the Supreme Court of the State of Ten-

COPY BOUND TO

nessee on November 29, 1913, and the judgment of the Court of Civil Appeals was affirmed and the judgment rendered by the Supreme Court of the State of Tennessee in favor of the said D. F. and T. C. Rankin and against the petitioners, Cincinnati, New Orleans & Texas Pacific Railway Company, for the sum of $4508.82 and interest amounting to $204.45, and all the costs of said cause.

Said Supreme Court delivered no written opinion, but simply affirmed the decree of the Court of Civil Appeals. The Court of Civil Appeals filed a written opinion which is in the record, in which it held in effect:

1st. That the common law liability of a common carrier of interstate freight was not altered or changed by the Carmack Amendment to the Interstate Commerce Commission Act.

2nd. That the burden was upon the petitioner, Railway Company, to show affirmatively, that it had complied with the
306 provisions of the Interstate Commerce Commission Act requiring common carriers of interstate freight to file their schedule of rates with said Interstate Commerce Commission.

3rd. Petitioner having failed to affirmatively show that it had filed its schedule of rates with the Interstate Commerce Commission, its liability under the Bill of Lading was not controlled by the Act of Congress or the decisions of the Supreme Court of the United States, but by the decisions of the Supreme Court of the State of Tennessee with reference to liability under said Bill of Lading.

4th. That under the decisions of the Supreme Court of the State of Tennessee, the agreed valuation clause set out in said Bill of Lading was invalid, and hence petitioner was liable to defendants in error, D. F. and T. C. Rankin, for the full value of the mules as shown by the proof, regardless of said agreed valuation clause.

307 Petitioner further shows that the said judgment of said Supreme Court of the State of Tennessee was and is a final judgment in the highest court in the State of Tennessee in which a decision in said suit could or can be had. Petitioner further shows that a federal question was made in said case, towit, as hereinbefore set out, involving a construction of a statute of the Congress of the United States, being an amendment to the Interstate Commerce Act, hereinbefore referred to. Said Act of Congress provides as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in *our* State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass." The construction of said Act was necessarily involved in the decision of the Supreme Court of Tennessee, as hereinbefore set out, and the judgment of said Supreme Court of Tennessee was repugnant to and in conflict with the said Act of Congress and the commerce clause of the Constitution of the United States, as hereinbefore set out. Said judgment of the Supreme Court of Tennessee denied to the

TO CLOSE IN CENTER

plaintiff in error its rights under said Act of Congress and the Commerce clause of the Constitution of the United States. As before stated, the decision of said federal question was necessary to the judgment rendered by the Supreme Court of Tennessee in this cause. Said judgment so rendered was contrary to the provisions of said Acts of Congress and the Constitution of the United States.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the State of Tennessee in said cause, and prays that a writ of error to said Supreme Court be allowed, that citation be granted and signed, that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such case made and provided, said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the
308 United States, and that the judgment aforesaid of said Supreme Court of Tennessee be reversed.

Petitioner presents herewith an assignment of error, specifically pointing out the error committed by the Supreme Court of Tennessee in this case.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,

By Its Attorneys in Law and in Fact,

MICHAEL M. ALLISON,
JAMES J. LYNCH, AND
ISAAC G. PHILLIPS,
Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, this 30th day of December, 1913, the writ of error to operate as a supersedeas, and a bond for that purpose is fixed at the sum of $7,500.00.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed in my office this 31 day of December, A. D. 1913.

S. E. CLEAGE,
309 *Clerk of the Supreme Court of the State of Tennessee.*

Filed December 31, 1913. S. E. Cleage, Clerk.

In the Supreme Court of the State of Tennessee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

D. F. and T. C. RANKIN, Defendants in Error.

Bond.

Know all men by these presents, That we, Cincinnati, New Orleans & Texas Pacific Railway, as principal, and M. M. Allison,

COPY BOUND

J. J. Lynch and I. G. Phillips, as sureties, are held and firmly bound unto D. F. and T. C. Rankin in the sum of seven thousand five hundred Dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this — day of December, A. D. 1913.

Whereas the above named Cincinnati, New Orleans & Texas Pacific Railway Company has prosecuted a writ of error and of supersedias in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Tennessee;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, Cincinnati, New Orleans & Texas Pacific Railway Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to re-

310 main in full force and effect.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Principal,*
By JAMES J. LYNCH.
M. M. ALLISON, *Surety.*
J. J. LYNCH, *Surety.*
I. G. PHILLIPS, *Surety.*

Approved:

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

311 Filed December 31, 1913. S. E. Cleage, Clerk.

In the Supreme — of the State of Tennessee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
D. F. and T. C. RANKIN, Defendants in Error.

Assignments of Error.

Now comes the Cincinnati, New Orleans & Texas Pacific Railway Company, plaintiff in error, and respectfully submits that, in the record, proceedings, decision and final judgment of the Supreme Court of Tennessee, in the above entitled matter, there is manifestly error in this, to wit:

I.

The court was in error in holding that the common law liability of carriers of interstate freight was not changed by the Carmack

D TO CLOSE IN CENTER

Amendment to the Interstate Commerce Act, being Amendment passed by the Congress of the United States on June 29, 1906, and published in 34 Stats. at Large, 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1228.

II.

The court erred in holding that the plaintiff in error, being a common carrier of freight, was liable in this case for the loss sued for by the defendants in error, although said loss was not caused by the negligence of the plaintiff in error, or its agents or employes.

III.

The court erred in holding that the Circuit Court did not err in charging the jury as follows:

"Negligence is the want or lack of exercise of that degree of care which the particular circumstance demands. In this case, the carrier is held to the highest degree of care for the safe transportation of the animals."

312 Under what is known as the Carmack Amendment to the Interstate Commerce Act, plaintiff in error was only liable for the loss caused by the want of ordinary care on the part of its agents and employes and is not held to the "highest degree of care" as charged by the trial court. The Supreme Court erred in not reversing this case for said error.

IV.

The court erred in rendering judgment against the plaintiff in error for more than seventy-five dollars ($75.00) each for the animals in this case, seventy-five dollars ($75.00) each being the value of said animals, fixed in the contract between the plaintiff in error and the defendants in error, filed as Exhibit No. 1 to the declaration of the defendants in error. Which contract is valid and enforcible, under the Act passed by the Congress of the United States on June 29, 1906, as an amendment to the Interstate Commerce Act and known as the Carmack amendment, as interpreted by the Supreme Court of the United States. Said Act of Congress requires Common carriers to issue bills of Lading on Interstate shipments of freight and provides for and regulates the carrie-s' liability thereunder.

This Act was passed in the proper exercise of the power conferred by the Commerce Clause of the Constitution of the United States (Article 1, Section 8), and the judgment of the Supreme Court complained of is violative of and denies to the plaintiff in error, the rights conferred by said Act of Congress and said provision of the constitution of the United States.

V.

The Supreme Court erred in not reversing the judgment of the Circuit Court (and the judgment of the Court of Civil Appeals in affirming same), on account of the errir of said Circuit Court in hold-

COPY BOUND T

ing that, as a matter of law, the limited valuation clause set out in the Bill of Lading sued on, was invalid, and in instructing the jury that, if the defendants in error were entitled to recover, they were entitled to recover the full value of the property, as shown by the testimony of witnesses.

This instruction violates the Act of Congress referred to
313 in the preceding assignments of error and article of the constitution herein set forth and was a denial to the plaintiff in error of the rights thus conferred.

VI.

The court erred in declining to reverse judgment of the Circuit Court and the Court of Civil Appeals, because of the error of the Circuit Court in announcing, in the presence of the jury:

"It therefore follows that under the facts of this case, the undisputed facts of the decisions of our courts on this subject, that the court is of the opinion that the contract in this case is invalid, and the question goes to the jury as to the negligence of the defendant on this shipment of stock."

And in charging the jury:

"If you reach the conclusion that the plaintiff has made out its case and is entitled to recover for the value of the 19 mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value at the time they would have been delivered, but for the negligence of the carrier."

This announcement that the contract was invalid and instruction above quoted, nullified the provision in the contract to the effect that the value of the mules was $75.00 each, and this was violative of the Act of Congress, known as the Carmack Amendment to the Interstate Commerce Act, and the Commerce Clause of the constitution of the United States, under the authority of which said Act was passed.

VII.

The court erred in not reversing the judgment of the Circuit Court and the Court of Civil Appeals because of the error in the Circuit Court in permitting the defendants in error to prove by the witnesses: D. F. Rankin, T. C. Rankin, Robert C. Rankin, H. L. Pense, J. H. Goggin, Wilson Alexander, Montie Fox, Jake Robinson, over the objection of counsel for plaintiff in error, that
314 the animals in question were worth from $200.00 to $250.00.

This testimony was objected to by counsel for the plaintiff in error, because said value was fixed by the terms of the contract sued on, at $75.00 for each animal and, under the provision of the Act of Congress, cited in the foregoing assignments of error, this was a valid and enforceable contract. The admission of said testimony was violative of said Act of Congress and of plaintiff in error's rights thereunder.

TO CLOSE IN CENTER

VIII.

The court erred in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the provision of the Interstate Commerce Act by *by* filing its schedule of rates, containing the rate charged the defendants in error, with the Interstate Commerce Commission.

IX.

The court erred in holding that the construction of the contract, sued on in this case, was not a federal question but that it was controlled by the decision of the Supreme Court of Tennessee, whereas this Bill of Lading and contract, sued on, was issued by virtue of the requirements of the Act of Congress, known as the Carmack Amendment and was a contract for interstate shipment of goods and the rights thereunder depend upon the construction of said Act of Congress and should be controlled by the decision of the Supreme Court of the United States and not by the rules established by the courts of Tennessee.

X.

The court erred in holding that plaintiff in error was not entitled to the benefit of the provisions of the Act of Congress, known as the Carmack Amendment to the Interstate Commerce Act, because it did not affirmatively show that it had filed with the Interstate Commerce Commission its schedule of rates, under which the shipment in question was made.

MICHAEL M. ALLISON,
JAMES J. LYNCH,
ISAAC G. PHILLIPS,
Attorneys for Petitioner, Cincinnati, New Orleans and Texas Pacific Ry. Co.

315 Filed January 7, 1913. S. E. Cleage, Clerk.

The Supreme Court of the State of Tennessee.

C., N. O. & T. P. Ry. Company, Plaintiffs in Error,
vs.
D. F. and T. C. Rankin, Defendants in Error.

The undersigned, D. F. and T. C. Rankin, by Attorneys, hereby expressly waive the issuance of service of citation and any other or further notice of the filing of the petition for writs of error and Supersedeas by plaintiffs in error in this cause and for granting of same.

We hereby agree that the case should be treated as if proper citation and notice had been issued and served, as required by law and the rules of the court.

This the 6th day of January, 1914.

CHAS. C. FOX,
W. B. MILLER,
Att'ys for D. F. & T. C. Rankin.

316 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Tennessee before you, or some of you, being the highest court of law or equity of the said State, to which a decision could be had in the said suit between D. F. and T. C. Rankin, as plaintiffs and Cincinnati, New Orleans & Texas Pacific Railway Company, as defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Cincinnati, New Orleans & Texas Pacific Railway Co., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof,
317 that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of January, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
Clerk of the District Court of the United States, Eastern District of Tennessee.

318 Office of the Clerk of the Supreme Court for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court, do hereby certify that on the 31st day of December, 1913, there was filed in my office the petition of the Cincinnati, New Orleans and Texas Pacific Railway Company for writ of error a copy of which is hereinbefore set forth, with endorsement thereon signed by the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, reading as follows:

"The writ of error as prayed for in the foregoing petition is hereby allowed, this 30th day of December, 1913, the writ of error to operate as a supersedeas, and a bond for that purpose is fixed at the sum of $7,500.00.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee."

On the same date there was filed in my office the original Bond of the Cincinnati, New Orleans and Texas Pacific Railway Company, with M. M. Allison, J. J. Lynch and I. G. Phillips, as sureties, in the penalty of Seven Thousand Five hundred dollars ($7,500.00), approved by Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, copy of which is hereinbefore set forth.

On the same date there was lodged in my office assignments of error of the Cincinnati, New Orleans and Texas Pacific Railway Company as hereinbefore set forth.

On the same date there was lodged in my office waiver of D. F. and T. C. Rankin of the issuance of service of citation and any other or further notice of the filing of the petition for writs of error and supersedeas, and that on the 14th day of January, 1914, there was lodged in my office the original writ of error to the Supreme Court of the United States, as hereinbefore set forth, and signed by Hon. Horace Van Deventer, Clerk of the District Court of the United States, Eastern District of Tennessee.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, Tennessee, on this the 15th day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*

Endorsed on cover: File No. 24,029. Tennessee Supreme Court. Term No. 344. Cincinnati, New Orleans & Texas Pacific Railway Company, plaintiff in error, vs. D. F. and T. C. Rankin. Filed January 24th, 1914. File No. 24,029.

FILED
APR 22 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

No. [redacted] 59

OCTOBER TERM, 1914

CINCINNATI NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

Plaintiff in Error

Against

D. F. AND T. C. RANKIN

Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

MICHEAL M. ALLISON,
JAMES J. LYNCH,
ISAAC G. PHILLIPS,

Attorneys for Plaintiff in Error

EDWARD COLSTON *of Counsel.*

MACGOWAN-COOKE PTG. CO., CHATTANOOGA

INDEX OF SUBJECTS.

PAGE

Statement of the case ..... 3 to 15
Declaration ..... 4 to 7
Bill of lading ..... 7 and 8
Pleas ..... 8 to 11
Assignment of Errors ..... 15 to 20
Brief and Argument ..... 20 et sq.
Question of Liability ..... 20 to 29
Carmack Amendment ..... 20 and 21
Limited Valuation ..... 29 to 44
Conclusion ..... 44 and 45

Citations of Cases:

Railroad vs. Stone & Hasslet ..... 32 and 39
Railroad vs. Smith 32
Hart vs. Pennsylvania Railroad 33
Chicago, etc., Railway vs. Latta 33
Chicago, etc., Railway Co. vs. Miller 33
Railway vs. Harriman 33-34-38
Bernard vs. Adams Express Co. 33
Pennsylvania Railroad vs. Hughes 36
Adams Express Co. vs. Croninger ..... 21 and 33
Southern Ry. vs. King 26
L. & N. R. R. Co. vs. Hairston 26
Railway Co. vs. Abilene Oil Co. ..... 40 and 42
Railway Co. vs. Coal Co. 40
Clement vs. L. & N. R. R. Co. 40
Meeker vs. Lehigh Valley R. R. Co. 41
Railway Co. vs. Hefley 42
Railway Co. vs. Hugg 42
Knox County vs. Ninth National Bank of N. Y. 43

IN THE

Supreme Court of the United States

No. 344.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

D. F.and T. C. RANKIN, *Defendants in Error.*

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

May it Please the Court:

Briefly stated, the facts in this case are as follows: On the 22nd day of April, 1912, the defendants in error, D. F. and T. C. Rankin, brought suit against plaintiff in error, the Cincinnati, New Orleans & Texas Pacific Railway Company, in the Circuit Court at Chattanooga, Tennessee, for damages in the sum of Five Thousand Dollars.

On August 23, 1912, the said D. F. and T. C. Rankin filed their declaration in the said cause. Said declaration contained two counts. The first count averred that on or about the 6th day of November, 1911, the said defendants in error, through D. F. Rankin, delivered to the said Rail-

way Company, in good condition, nineteen mules, to be transported by the said Railway Company, from Danville, Ky., to Atlanta, Ga.

The declaration averred that said petitioner, Railway Company, was a common carrier, operating a line of railway over which it transported freight for hire. The declaration averred that the said shippers agreed "to pay the full freight or tariff charged by defendant (railway company) for such transportation, on delivery of said mules at the point of destination; the defendants accepted said mules for transportation on the terms aforesaid, and agreed and became bound to safely transport and deliver them in the same sound condition in which they were received at the place aforesaid."

It was then averred that the said Railway Company failed to deliver said mules at the point of destination as agreed, and instead wrongfully and negligently failed and refused to do so, and negligently wounded, maimed, bruised and killed all, or a portion of said mules, and failed and refused to deliver same. It was alleged that said mules were reasonably worth $250.00 each, the injuries to all of which amounted to $4,750.00.

The second count in the declaration contained the same allegation as to the value of the mules injured, and the delivery of the same to the petitioner, Railway Company, It was further alleged that said Railway Company contracted to transport said mules from Danville, Ky., a station on said Company's line of railway, over its own line to Chattanooga, Tennessee, and there deliver same to a connecting carrier to be transported to Atlanta, Ga., for delivery to the said D. F. and T. C. Rankin.

The declaration further averred that—"said D. F.

Rankin agreed to pay the full freight tariff demanded by the defendant for transportation, upon delivery of the said mules and horses at destination." This count in the declaration averred further that—"the defendant executed and delivered to D. F. Rankin a receipt, or Bill of Lading, copy of which is here to the Court shown, being filed as Exhibit No. 1 hereto, in which defendant acknowledged the receipt of said mules and horses for transportation, and delivery to said plaintiff, and in and by which defendant undertook and attempted to stipulate that in case of loss or damage to said stock, defendant should not be liable for more than $75.00 for each animal. Said limitation was not called to the attention of either of plaintiffs, and neither of them assented to or knew of the same; and they aver that the whole of said paper, and especially the $75.00 limitation, is void and of no effect and is not operative or binding on them or either of them for the following, among other, reasons:"

"1. Because said contract of shipment was made in the State of Kentucky, and the rights of the parties thereto are to be measured and controlled by the laws of said State; and under the constitution laws and decisions of the Courts of Kentucky, the said stipulation, undertaking to limit the liability of the carrier to less than the actual value of the property is contrary to public policy and absolute void; hence plaintiffs are not bound thereby.

"2. Independent of the constitution, laws and decisions of Kentucky, such limitation, in order to be valid or effective, must be reasonable; and the said stipulation in the Bill of Lading in this case is grossly unreasonable and unjust, in that it undertakes to fix and limit the value of all horses and mules without discrimination or distinction, at 'not exceeding $75.00 each'; whereas, the mules belonging to and shipped by the plaintiffs, as aforesaid, were worth at least three or more times as much as $75.00 each.

"3. No other contract of transportation was mentioned or offered to plaintiffs, nor did they or either of them have any knowledge or information that the shipment was to be made at a reduced rate and under a stipulation for limited liability, nor was any option given to ship either under a common law contract, without limitation on the amount of liability, or under the contract as actually delivered; nor was any option whatsoever offered them or brought to the attention of them or either of them.

"4. There was no consideration whatever to sustain said limited liability stipulation.

"5. The defendant and plaintiffs were not on the same or an equal footing, in that defendant, together with its connecting carriers, owned the only direct line of railway from Danville, Kentucky, the home of plaintiffs, where said stock then was, to Atlanta, Georgia, and could practically dictate terms to plaintiff in the matter of transportation.

"The statement in said Exhibit 1—'That the published freight rates on live stock of said carrier are in all cases based upon the following maximum valuation, which are as high as the profit in the freight rates, will admit of the carrier assuming responsibility for', plaintiffs are advised is wholly untrue and same was not brought to their attention, nor was it assented to by them.

"The further statement or recital therein 'that the tariff regulations of said carrier provide that for every increase of 100 per cent or fraction thereof in the above valuations there shall be an increase of 50 per cent, in the freight rate', as plaintiffs are advised and charge, was and is wholly untrue.

"The recitals aforesaid appear in item 3 of said Exhibit

1, and plaintiffs charge that they are unjust, untruthful, discriminatory, arbitrary and unreasonable.

"Wherefore plaintiffs aver that said item 3 aforesaid, and especially the valuation of $75.00 therein, are absolutely void."

The said Bill of Lading filed as Exhibit 1 to the declaration, contains the following stipulations:

"3. Limit of Value."

"That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz.:

"That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit on the freight rates will admit of the carrier assuming responsibility for:

Stallions or Jacks, not exceeding	$150.00	each
Horses or Mules, not exceeding	75.00	
Mare and Colt together, not exceeding	100.00	
Ponies, not exceeding	40.00	
Cattle, except yearlings, not exceeding	30.00	
Cow and Calf together, not exceeding	35.00	
Yearling Cattle, not exceeding	20.00	
Hogs, Pigs, Calves, Sheep or Lambs, not exceeding	5.00	each
Turkeys, not exceeding	1.50	doz.
Geese, not exceeding	1.00	"
Chickens, Ducks, or Guinea Fowls, not exceeding	.75	"

"That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase of fifty per cent in the freight rate; and

"That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for."

"4. Guaranteed Freight Rate."

"That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations, is $---------- per ------ from -------- to -------- and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc." (Record, pp. 6 and 7.)

(Defendants in error, D. F. and T. C. Rankin, each testified that said freight rate was $95 per car.) Record, pp. 31 and 55.)

The Railway Company filed nine pleas.

The first is a plea of not guilty, which is merely a denial of liability.

The second is a denial of breach of contract of carriage.

The third is a denial that the limited valuation clause in the contract of shipment was illegal for any of the reasons stated in the declaration.

The fourth is a denial of the allegation in the declaration that the limited valuation clause in the contract of shipment is void under the laws of the State of Kentucky. This plea insists that as the shipment was interstate the laws of Kentucky have no application.

The fifth is as follows: "For further plea to so much and such parts of the plaintiff's declaration as charge that the contract filed as Exhibit "A" to plaintiff's declaration is invalid because (a) the contract is unreasonable; (b) no other contract of transportation was offered to plaintiff, or no option given to plaintiff to ship under a common law contract without limitation on the amount of liability; (c) that there was no consideration to sustain the limited liability stipulated in the contract; and (d) that the plaintiff did not assent to the terms of said contract, defendant says that said contract is not invalid for these or any other reasons, but the same is valid and binding, having been entered into freely and knowingly by the plaintiff; the plaintiff having at the time said contract was entered into the option of shipping said stock under the contract executed, which is filed as Exhibit "A" to plaintiff's declaration, or under a contract of common law liability at a higher freight rate, which was also reasonable."

The sixth is as follows: "Defendant for further plea says that it is a common carrier, subject to the provisions of the Act of Congress regulating interstate commerce approved February 4, 1897, and the amendments thereto; that prior to the shipment of horses and mules as set out in plaintiff's declaration it had duly filed in the office of the Interstate Commerce Commission, as required by said Act

of Congress, schedules of joint rates showing the rates and charges for transportation of live stock between different points on its own road, and between points on its own road and points on connecting roads between Danville, a point in the State of Kentucky, and Atlanta, a point in the State of Georgia, and had printed and kept open to the public inspection at Danville such schedule showing the rates and charges for transportation of live stock, including horses and mules, between Danville, Kentucky, and Atlanta, Georgia; that said schedules contained the classification of freight in force and stated separately all the terminal and other charges, as required by said Act of Congress, and the rules and regulations of the Interstate Commerce Commission, which provided that the freight rate in carload lots upon horses and mules from Danville, Kentucky, to Atlanta, Georgia, where the value of said horses and mules did not exceed $75.00 each should be $95.00 per car, and that said regulations also provided that for every increase of 100 per cent or fraction thereof in said valuations there should be an increase of 50 per cent in the freight rate. Plaintiff knowing these facts, and in order to avail himself of said minimum freight rate of $95.00, fixed the value of each of said mules so shipped by him at $75.00 and represented to defendant that this amount was the just and true value of said animals. The defendant had no knowledge or means of knowing as to the value of said animals except as the same was derived from the plaintiff or his agent; and plaintiff is now estopped from denying that said valuation as thus fixed by him and upon which he obtained said minimum freight rate is unjust or unreasonable, and if liable for any amount defendant pleads these facts as a bar to any recovery in excess of $75.00 on each mule so injured in said shipment."

The averments of the seventh plea are similar, with reference to the limited valuation and the filing of the sched-

ules of rates with the Interstate Commerce Commission, to the averments in the sixth plea. This plea concludes as follows: "Defendant had no knowledge of the actual value of said mules, nor any means of knowing the true value of the same, but relied entirely upon the value declared by the plaintiff in said contract; and the defendant for plea says that the actual value of said stock was more than $75.00 the plaintiff has been guilty of a wilful violation of the Act of Congress regulating interstate commerce by fraudulently obtaining transportation of said mules at an illegal rate through the suppression of information as to the true value thereof, and that the law will not lend itself to enforce a demand having its origin in the breach of the law itself."

The eighth is a denial of the conversion of the property.

The ninth plea is similar in its averments to the sixth and seventh. (Record, pp. 11, 12, 13, 14 and 15.)

The case was tried in the Circuit Court at Chattanooga. The Court held that the limited valuation clause in the Bill of Lading sued on was invalid. (Record, p. 72.) He charged the jury that if the plaintiff was entitled to recover, the verdict should be for the full value of the mules killed. He further charged:

> "If you find from the proof in this case that the plaintiff did deliver in good condition 19 mules to the defendant to be transported to Atlanta, Georgia, and that there was an accident, a collision on the railroad, then the burden is upon the Railway Company to show that it has not been guilty of any negligence." (Record, p. 73.)

At the conclusion of the Court's charge, one of the attor-

neys for defendants in error asked the Court to define negligence to the jury, in response to which the Court said:

> "Gentlemen of the jury, negligence is the want or lack of exercise of that degree of care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals." Record, p. 73.)

The jury rendered a verdict in favor of the defendants in error for $4,508.82. (Record, p. 73.)

A motion for a new trial having been overruled, the case was appealed to the Court of Civil Appeals, where errors were assigned. (Record, pp. 77-78.)

On July 21, 1913, the Court of Civil Appeals handed down an opinion affirming the judgment of the Circuit Court. (Record, pp. 100-112.)

The case was carried to the Supreme Court of the State by petition for *certiorari* and *supercedeas*. (Record, pp. 113-118.)

In the Supreme Court, errors were assigned to the action of the Court of Civil Appeals in affirming the judgment of the Circuit Court, which assignment of errors is as follows:

"The plaintiff in error insists that the judgment of the Circuit Court was erroneous and that the decree of the Court of Civil Appeals affirming same should be reversed for the following reasons:

> (1) Because there is no evidence to sustain the verdict of the jury or the judgment of the Court for any amount, the testimony conclusively showing that the injury to the stock of the defendants in error

was caused by an unforseen accident over which the plaintiff in error had no control, and which its agents and employes could not have avoided in the exercise of proper care.

In the exercise of the power conferred by the Commerce Clause of the Constitution of the United States (Art. 1, Sec. 8), the Congress of the United States on June 29, 1906, passed an Act known as the Carmack Amendment to the Interstate Commerce Act, providing that carriers of interstate freight should be liable only for injuries to freight "caused by it." In holding the plaintiff in error liable in this case the Court failed to give effect to this provision of the Constitution and laws of the United States.

(2) Because the Circuit Court erred in charging the jury as follows:

'Negligence is the want or lack of exercise of that degree of care which the particular circumstances demand. In this case the carrier is held to the highest degree of care for the safe transportation of the animals.'

(3) The Circuit Court erred in permitting the proof of the rules of the company with reference to the rate of speed at which the trains should be run through the town of Dayton to be introduced, because neither the existence nor breach of such rules is alleged in the declaration, and, further, because it was shown and admitted that these rules were adopted for the protection of persons and animals of freight being carried by the Railway Company.

(4) The Circuit Court erred in permitting the

proof of the ordinance of the municipality of Dayton to go to the jury, because there was no proof to show that said ordinance was legally and properly adopted.

(5) The Circuit Court erred in declining to permit Witness Hartman (the engineer) to testify that he was running the train at the time of the accident at the rate of speed at which such trains were usually and customarily run in Dayton and towns of like size, and that he was not running the train at a dangerous rate of speed at the time of the accident.

(6) The Circuit Court erred in holding that as a matter of law the limited valuation clause was invalid, and in instructing the jury that if the defendants in error were entitled to recover, they were entitled to recover the full value of the property.

This is contrary to the provisions of the Interstate Commerce Act known as the Carmack Amendment, passed June 29, 1906, and published in 34 Stats. at Large, 584, Chap. 3591, U. S. Comp., Stat. Supp. 1911, p. 1288, and violative of the Commerce Clause of the Constitution of the United States.

(7) The Court was in error in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the requirements of the Interstate Commerce Act in filing its rates with the Interstate Commerce Commission.

(8) The Circuit Court erred in declining to sustain the limited valuation clause set out in the bill of lading.

(9) The Circuit Court erred in permitting tes-

timony to go to the jury as to the value of the mules, because this value was fixed by the terms of the contract at $75.00 for each mule.

(10) The Circuit Court erred in permitting the defendants in error to testify that they did not read the bill of lading and did not know it contained a limited valuation clause." (Record, pp. 121-122.)

These assignments of error were supported by brief and argument. (Record, pp. 122 to 152.)

On November 29, 1913, the judgment of the Court of Civil Appeals was affirmed in an oral opinion and judgment entered accordingly. (Record, pp. 165-166.)

On proper petition the case was brought to this Court by writ of error to the Supreme Court of Tennessee.

With the petition for writ of error, plaintiff in error filed the following:

ASSIGNMENT OF ERRORS.

I.

The Court was in error in holding that the common law liability of carriers of interstate freight was not changed by the Carmack Amendment to the Interstate Commerce Act, being Amendment passed by the Congress of the United States on June 29, 1906, and published in 34 Stats. at Large, 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1228.

II.

The Court erred in holding that the plaintiff in error, being a common carrier of freight, was liable in this case for the loss sued for by the defendants in error, although

said loss was not caused by the negligence of the plaintiff in error, or its agents or employes.

III.

The Court erred in holding that the Circuit Court did not err in charging the jury as follows:

> "Negligence is the want or lack of exercise of that degree of care which the particular circumstance demands. In this case, the carrier is held to the highest degree of care for the safe transportation of the animals."

Under what is known as the Carmack Amendment to the Interstate Commerce Act, plaintiff in error was only liable for the loss caused by the want of ordinary care on the part of its agents and employes and is not held to the "highest degree of care" as charged by the trial court. The Supreme Court erred in not reversing this case for said error.

IV.

The Court erred in rendering judgment against the plaintiff in error for more than seventy-five dollars ($75.00) each for the animals in this case, seventy-five dollars ($75.00) each being the value of said animals, fixed in the contract between the plaintiff is error and the defendants in error, filed as Exhibit No. 1 to the declaration of the defendants in error. Which contract is valid and enforcible, under the Act passed by the Congress of the United States on June 29, 1906, as an amendment to the Interstate Commerce Act and known as the Carmack Amendment, as interpreted by the Supreme Court of the United States. Said Act of Congress requires common carriers to issue bills of lading on interstate shipments of freight

and provides for and regulates the carrier's liability thereunder.

This Act was passed in the proper exercise of the power conferred by the Commerce Clause of the Constitution of the United States (Article 1, Section 8), and the judgment of the Supreme Court complained of is violative of and denies to the plaintiff in error, the rights conferred by said Act of Congress and said provision of the Constitution of the United States.

V.

The Supreme Court erred in not reversing the judgment of the Circuit Court (and the judgment of the Court of Civil Appeals in affirming same), on account of the error of said Circuit Court in holding that, as a matter of law, the limited valuation clause set out in the bill of lading sued on, was invalid, and in instructing the jury that, if the defendants in error were entitled to recover, they were entitled to recover the full value of the property, as shown by the testimony of witnesses.

This instruction violates the Act of Congress referred to in the preceding assignments of error and article of the Constitution herein set forth and was a denial to the plaintiff in error of the rights thus conferred.

VI.

The Court erred in declining to reverse judgment of the Circuit Court and the Court of Civil Appeals, because of the error of the Circuit Court in announcing in the presence of the jury:

> "It therefore follows that under the facts of this case, the undisputed facts of the decisions of our

> courts on this subject, that the Court is of the opinion that the contract in this case is invalid, and the question goes to the jury as to the negligence of the defendant on this shipment of stock."

And in charging the jury:

> "If you reach the conclusion that the plaintiff has made out its case and is entitled to recover for the value of the 19 mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value at the time they would have been delivered, but for the negligence of the carrier."

This announcement that the contract was invalid and instruction above quoted, nullified the provision in the contract to the effect that the value of the mules was $75.00 each, and this was violative of the Act of Congress, known as the Carmack Amendment to the Interstate Commerce Act, and the Commerce Clause of the Constitution of the United States, under the authority of which said Act was passed.

VII.

The Court erred in not reversing the judgment of the Circuit Court and the Court of Civil Appeals because of the error in the Circuit Court in permitting the defendants in error to prove by the witnesses: D. F. Rankin, T. C. Rankin, Robert C. Rankin, H. L. Pense, J. H. Goggin, Wilson Alexander, Montie Fox, Jake Robinson, over the objection of counsel for plaintiff in error, that the animals in question were worth from $200.00 to $250.00.

This testimony was objected to by counsel for the plaintiff in error, because said value was fixed by the terms of

the contract sued on, at $75.00 for each animal and, under the provision of the Act of Congress, cited in the foregoing assignments of error, this was a valid and enforcible contract. The admission of said testimony was violative of said Act of Congress and of plaintiff in error's rights thereunder.

VIII.

The Court erred in holding that the burden of proof was on the plaintiff in error to show affirmatively that it had complied with the provisions of the Interstate Commerce Act by filing its schedule of rates, containing the rate charged the defendants in error, with the Interstate Commerce Commission.

IX.

The Court erred in holding that the construction of the contract sued on in this case was not a federal question, but that it was controlled by the decisions of the Supreme Court of Tennessee, whereas this bill of lading and contract, sued on, was issued by virtue of the requirements of the Act of Congress, known as the Carmack Amendment and was a contract for interstate shipment of goods and the rights thereunder depend upon the construction of said Act of Congress and should be controlled by the decision of the Supreme Court of the United States and not by the rules established by the courts of Tennessee.

X.

The Court erred in holding that plaintiff in error was not entitled to the benefit of the provisions of the Act of Congress known as the Carmack Amendment to the Interstate Commerce Act, because it did not affirmatively show that it had filed with the Interstate Commerce Commission

its schedule of rates, under which the shipment in question was made.

BRIEF AND ARGUMENT.

This case involves two general propositions, one being the question of liability, and the other the question of the validity of the limited valuation clause set out in the Bill of Lading.

Each is a Federal question involving a construction of the so-called Carmack Amendment. The first three errors assigned go to the question of the railway company's liability. The other errors assigned all go to the question of the validity of the limited valuation in the contract of shipment.

We will, therefore, discuss the case under these two general headings.

THE QUESTION OF LIABILITY.

Under the common law rule, adhered to by the courts of Tennessee, a carrier is not only liable for loss resulting from its negligence, but is an insurer of the safe delivery of all freight committed to its care against loss from any cause except that resulting from the act of God or the public enemy.

However, we insist that this rule is abolished by the recent amendment to the Interstate Commerce Act known as the Carmack Amendment, passed June 29, 1906, which provides as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a

point in one state to a point in another state shall issue a receipt or Bill of Lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

(34 State at L. 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, 1288.)

The effect of this amendment was passed on by this Court in the recent case of *Adams Express Company vs. Croninger*, 266 U. S., p. 491.

With reference to the effect of this legislation Mr. Justice Lurton said:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulations or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

It will be noticed that this Act does not provide that the carrier shall be liable as an insurer, but shall only be liable for loss or damage "caused by it."

With reference to this provision, Mr. Justice Lurton said:

"What is the liability imposed upon the carrier? It is a liability to any holder of the Bill of Lading which the primary carrier is required to issue, 'For any loss, damage, or injury to such property caused by it,' or any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a common carrier."

Under the facts of this case, it cannot be successfully insisted that the injury to the plaintiff's property was 'caused by' the plaintiff in error. There is no dispute with reference to the manner in which this accident occurred.

But two witnesses were introduced on this subject: Charlie Hawkins, who was introduced by the defendant in error and M. L. Hartman, the engineer in charge of the engine, the derailment of which caused the injury to the property in question. Each testified as to the manner in which the accident occurred and there is no substantial difference in their testimony. Mr. Hartman, the engineer, said that he was operating the engine, on the train at the time the accident occurred; it was a through freight train going South, and was running about eighteen or twenty miles an hour. It was on a straight track and he could see the track ahead of him for perhaps a half mile. Just

before he reached the road crossing inside the corporate limits of the town of Dayton, a cow came suddenly upon the track about 50 or 75 feet in front of the engine. She came from behind an obstruction and the engineer could not and did not see her approaching the track until just before she got on it. He says with reference to this: "She came from behind a car at the road crossing; there was a string of cars along there and there was a space there just wide enough for a wagon to get through and this cow came out from behind these cars, the first I saw of her."

He states that he had already blown for this crossing and immediately when he saw the cow, he applied his brakes in emergency, which he says was the proper thing to do and the quickest way in which the train could be stopped. He says he did all he had time to do and that there was nothing else he could have done. (Record, pp. 57-58 and 59.)

When the engine struck the cow it knocked her in front of the engine, and when she fell down in front of the engine, the engine, "climbed her" (as he expressed it); that is to say, the wheels went up over the cow and this threw the engine from the track. In other words, when the engine struck the cow it knocked her up in the air, but instead of falling off the track to one side or the other, she fell back on the track and immediately the engine was derailed by coming into collision with her and the wheels running up over her. (Ib.)

This testimony is not disputed in the slightest, except that Witness Charlie Hawkins says he was under the impression the train was running about 40 or 50 miles an hour. He said, on cross-examination, however, that he could not tell how fast the train was running. (Record, pp. 69 to 71.)

He says he was in plain view of the engine and the crossing and saw the train coming for some distance. He was asked:

"When the cow appeared on the track the train was right there?"

Answer: "Yes, sir." (Record, p. 71.)

Now, manifestly, the engineer was not derelict in his duty with reference to keeping a lookout ahead and doing everything possible to stop the train and prevent an accident after the cow appeared on the track, or after he had notice that she was approaching the track. The engineer testified that he did everything possible, and this testimony was undisputed. He was amply sustained by the plaintiffs' witness, Hawkins, who says that when the cow appeared on the track the engine was right on her, and that the accident occurred almost instantly. (Record, p. 71.)

It was alleged that the train was running more than ten miles per hour in violation of a municipal ordinance.

The alleged ordinance, which appears on page 24 of the Record, reads as follows:

"SECTION 39. To run, or cause to be run in the city any railroad, engine, train, or car, faster than at the rate of ten miles per hour; or to run over any street or crossing within the city without continuously ringing the alarm bell during the progress over and between said crossing."

The Court will see that this ordinance does not forbid anything. The ordinance does not attempt to make it unlawful to run through the town of Dayton at any rate of speed. The alleged ordinance is absolutely meaningless and can be just as well construed as a permission to run ten miles per hour as a prohibition.

Assuming, however, that this ordinance does, in terms, prohibit the running of trains at a greater rate of speed than ten miles per hour, there are two conclusive reasons why the violation of same does not warrant a recovery against the plaintiff in error.

In the first place, the violation of this ordinance was not the proximate cause of the accident. There is not the slightest testimony introduced to show that there was more danger of a derailment resulting from a collision between the engine and the cow while the train was running at twenty miles an hour or forty miles an hour than if the train had been running at ten miles per hour. The only testimony on this subject was that of Witness Hartman, who was an experienced engineer and who testified that there was more danger of a collision when the train was running slow, than when the train was running fast. He was asked:

Q. "I will ask you whether or not running at a slower rate than 20 miles an hour, say as slow as ten miles or six miles an hour, state whether or not that lessens or increases the danger of derailment when you strike a cow?"

A. "Well, as a rule, we have more wrecks on account of cattle where they are running slow than where they are running fast."

Q. "Why is that?"

A. "Well, because when you hit stock when you are going fast they generally knock them clear off the track."

Q. "And they do not fall back on the track and fall under the engine?"

A. "No, sir."

Q. "Now I will ask you whether or not it is true that

the faster you are running the more apt you are not to derail the engine if you strike an object on the track?"

A. "Yes, sir." (Record, p. 101.)

This was absolutely undisputed and is manifestly true. Of course, the mere violation of an ordinance could in no event give a right of action unless the violation of the ordinance was the proximate and direct cause of the accident.

Unquestionably the ordinance of the town of Dayton was not passed and could not have been passed for the purpose of protecting the freight being carried by trains running through the municipality.

The courts have held that municipalities have a right to regulate the rate of speed of interstate trains through their borders, as an exercise of police power for the protection of the citizens of the municipalities.

Southern Ry. vs. King, 217 U. S., 524 *et. seq.* and cases there cited.

Obviously, this is the only power the municipality could exercise with reference to interstate trains, and, of course, the ordinance could only have been for the protection of the citizens of the town of Dayton and their property.

It is unnecessary to cite authorities to this Court to sustain the general proposition that any person for whose benefit a statute or ordinance has been passed may maintain a suit for damages resulting to him directly from a breach of such ordinance or statute. This right, however, does not extend to any other class of persons than those for whose benefit the statute was passed.

In the case of L. & N. R. R. Co. vs. Hairston, 122 Ga., 373, the Court says:

"The speed ordinance was passed for the protection of those of the public who were crossing the street. Its violation was not of itself an act of negligence which gave the employee riding on the train a cause of action."

And, as stated in Thompson on Negligence, Vol. 1, Sec. 12:

"It may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or a municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designated to prevent such injuries as were suffered by the individual claiming the damages."

We concede that if the common law rule as to the liability of carriers was not changed by the Carmack Amendment, then there is no error in the conclusion reached by the Supreme Court of Tennessee that the plaintiff in error is liable in this case.

On the other hand if this rule was changed and the carrier is no longer liable as an insurer, but only for loss "caused by it," then we submit the trial court was in error in charging the jury that the carrier should be held to "the highest degree of care."

In other words, the rule would require the carrier to exercise the same degree of care with reference to animals as is required with reference to passengers. Of this the Court of Civil Appeals say:

"Strictly speaking, it may be true that the rule stated by the learned judge does not apply to mules, but only to passengers, and yet, the rule as stated by his honor is no stronger than the common law, which makes the company

liable for the safe transportation of mules, or other freight, unless prevented from doing so by the act of God, or the public enemy.. The common law rule, which holds common carriers liable as insurers of the safe transportation of freight, is certainly as strong as the rule stated by the trial judge, and for these reasons we are not able to see wherein this error was harmful to the defendant, if it was error at all, and we do not hold that it was." Record, p. 107.)

It is thus manifest that the Company's liability and the Circuit Court's charge were sustained by the Court of Appeals and Supreme Court on the theory that the common law was not changed by the Carmack Amendment, and that common carriers are still liable, as insurers for all freight lost, except by the common enemy or the act of God. And so, at last, we must conclude that the Court's charge is erroneous if any force and effect is to be given to the Carmack Amendment.

As Congress has assumed control of the regulation and liability of carriers of interstate freight, there must be a uniform rule governing this liability, effective alike in all states. The states cannot be permitted to establish their own rules of liability because this would destroy the principle of uniformity essential to national control of this question. The Carmack Amendment puts new burdens on carriers of freight. It makes the initial carrier liable for freight lost on the lines of connecting carriers as well as on its own line. The liability of the initial carrier for loss on the connecting line is for such loss as is "caused by" the connecting line, and in the same language the initial carrier is liable for such loss on its own line as is "caused by it." Manifestly, it was not intended by Congress to make the initial carrier liable for any loss on the connecting line except such as is caused by the negligence of such

connecting carrier. Yet the liability of the initial carrier for loss on its own line and a connecting line is, under this Act, exactly the same.

If we are right in the construction of this Act then manifestly the case should be reversed because under the undisputed facts in this case the accident which caused the loss sued for was not "caused by" any act of the plaintiff in error or any negligence of its employees. The loss resulted from an unavoidable accident and not from negligence.

It also follows that the Court was in error in charging the jury that the plaintiff in error should be held to the "highest degree of carrier."

If we are wrong as to the proper construction of this Act and should the Court hold that interstate carriers of freight are still liable as insurers, this would bring us to a consideration of—

THE LIMITED VALUATION.

The contract of shipment was signed both by the agent of the plaintiff in error and D. F. Rankin, defendant in error. It was filed as Exhibit No. 1 to plaintiff's declaration. This contract was the basis of this suit. Among other provisions in the Bill of Lading is the following:

> "That this agreement is subject to the following terms and conditions which the said shipper accepts as just and reasonable and which he admits having read and having had explained to him by the agent of the said carrier, viz.:
>
> "That the published freight rates on live stock of said carrier are, in all cases, based on the follow-

ing maximum valuations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

"Mules not exceeding $75.00.

"That the tariff regulations of said carrier provide that for further increase of 100 per cent, or fraction thereof, in the above valuation, there shall be an increase of 50 per cent in the freight rate; and

"That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not in any case of loss or damage to said livestock be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated."

Both the defendants in error were stock men who had been shipping stock over this and other roads for many years.

D. F. Rankin, who signed the contract, testified that he had been shipping mules from Danville, Kentucky, seven or eight years. (Record, p. 32.)

He says he knew what the rates were, and that he had been paying $95.00 per car from Danville, Kentucky, to Atlanta, Georgia. (Record, p. 31.)

This witness testified that he did not read the contract at the time it was entered into. This was objected to by counsel for plaintiff in error. The objection was overruled, and exception entered. (Record, p. 32.)

The said witness testified that he did not see any rates posted and that he did not look for any. (Record, p. 31.)

The defendants in error took the stock to the stock yard, which was some distance from the depot and from thence went to the depot and applied for and received the bill of lading. The agent of the Company did not see the stock and knew nothing about the same except what was represented by the shipper. (Record, p. 34.)

Nothing was said by either the shipper or the agent of the carrier with reference to the valuation of the stock, except what appears in the bill of lading. (Record, p. 29.)

The defendants in error introduced testimony over the objection of the plaintiff in error, showing a valuation of from $200.00 to $250.00 for each of the mules. ((Record, p. 28.)

Plaintiff in error objected to this testimony on the ground that the valuation in the bill of lading cannot be contradicted by parol testimony, and the objection was overruled by the Court, to which plaintiff in error excepted. (Ib.)

No proof was introduced on either side to show whether the rates charged the defendants in error, and set out in the bill of lading sued on in this case, had been filed by the plaintiff in error with the Interstate Commerce Commission before the shipment in question.

The Circuit Court held that, as a matter of law, the contract for limited valuation set out in the bill of lading was void, and charged the jury that if plaintiff in error was liable the verdict should be for the full value of the mules, as shown by the testimony. Record, pp. 134-135.)

As shown, the defendants in error, in their declaration, attack the validity of the limited valuation clause in the contract sued on upon the following grounds:

(1) Because the limited valuation clause was void under the Constitution and laws of the State of Kentucky.

(2) Because the real value of the mules was "at least three or more times as much" as the value fixed in the bill of lading.

(3) Because the defendants in error were not offered any other rate and were given no option to ship under a common law contract without limitation on the amount of liability.

(4) There was no consideration to sustain the limited valuation contract.

(5) The shippers were not on equal footing with the carrier in making the contract and that the recitals in the contract with reference to said valuation were "unjust, untruthful, discriminating, arbitrary and unreasonable." (Record, pp. 3-4.)

The second ground of attack, that is to say, the insistence that the limited valuation clause was invalid because the property shipped was worth three or four times more than the value fixed in the contract is one that is sustained by the Courts of Tennessee.

> Railroad vs. Stone & Hasslet, 112 Tenn., 367;
> Railroad vs. Smith, 123 Tenn., 706.

In these cases, the rule is clearly laid down that a contract in a bill of lading which fixes a value which is very much less than the real value, will not be upheld.

This rule, however, does not obtain in this Court. On the contrary in the leading case of *Hart vs. Pennsylvania Railroad Company, 112 U. S., 330*, the real value of the stock shipped was shown to have been $19,800. The value fixed in the contract of shipment was $1,200.00, the real value being more than sixteen times the agreed value. Yet, the Court held this was a fair and reasonable contract and the shipper was only entitled to recover the amount of the agreed valuation.

In the case of *Chicago, etc., Railway vs. Latta, 226, U. S., p. 519*, the agreed valuation for the animal sued for was $100.00. The Court did not treat the question as to the real value as at all material, but we find upon an examination of the opinion of the lower court in the case, 172 Federal, 850, that the real value was $2,500.00, twenty-five times greater than the agreed value which was sustained by the Court.

In *Chicago, etc., Railway Co. vs. Miller, 226 U. S., p. 513*, we find that the agreed valuation of the animal sued for was $100.00 and that the proof showed the actual value to have been $2,000.00. In other words, the real value was twenty times the agreed value, and yet the agreed valuation contract was sustained.

In *Railway vs. Harriman, 229 U. S., 657*, the real value of the property lost was $10,640—the agreed value sustained by the Court of $380.00.

One of the cases cited by Mr. Justice Lurton in his opinion in the Croninger case was that of Bernard vs. Adams Express Co., 28 L. R. A., (new series) 293. The limited valuation was $50.00. The proof showed the real value to be $154.80; yet the limited valuation was sustained.

Another case referred to by Mr. Justice Lurton with approval was that of Greenwald vs. Barrett, etc., 35 L. R. A., (new series) 971, where the limited valuation was $50.00 and the real value $235.00. The limited valuation was sustained, though it was only one-fifth of the value.

It is thus manifest that this Court does not regard the difference between the real value and the agreed value as at all material.

That should certainly be true in a case such as we have in hand where the shipper knew and the carrier did not know the real value of the property shipped. The shipper knew that the agent of the carrier had not seen this property and did not know its value. On the contrary, the carrier handed to the shipper a bill of lading in which was plainly and distinctly printed the provision that the value of the mules would be assumed to be not exceeding $75.00 each, and the rate would be charged accordingly unless a higher value was declared by the shipper.

The defendants in error were experienced shippers who had many times before shipped at this same rate, which was $95.00 per carload, and received similar bills of lading.

In the case of *M., K. & T. R. Co. vs. Harriman, Supra*, this Court said:

> "That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented may be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate.

> Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise."

The Court of Civil Appeals of Tennesse, however, held that this case was not controlled by the Federal rule, but by the law of Tennessee. That Court held that the burden of proof was upon the carrier to show affirmatively it had filed its schedule of rates with the Interstate Commerce Commission, and—

"So far as the Interstate Commerce act is concerned this Railroad Company has made the contract in violation of its provisions, and, having done so, we do not think the opinion of Mr. Justice Lurton, for the Supreme Court of the United States, delivered January 6th, 1913, in the case of *Adams Express Company vs. E. H. Croninger*, is controlling. Having failed to file its schedule of rates with the Commission, as required by law, it follows that it had no right to make the contract limiting its liability, and that the right of the parties thereto is governed by the common law. As we understand Mr. Justice's opinion, the right of a common carrier to limit its liability for the value of a shipment is dependent upon the compliance by such carrier with the requirements of the Interstate Commerce Acts and its amendments, and if it has not done this, even if it be an interstate shipment, it has no right to limit its liability for the value of freght carried by it, unless the value fixed in its contract of shipment be 'fair, open, just and reasonable', using the language of Mr. Justice Lurton in the opinion cited."

There is no such intimation in the opinion referred to. On the contrary, the Court, expressly holds in that case that it is the Act of Congress which supersedes the state laws and regulations, and which makes the question in-

volved here a federal question and one which this Court has jurisdiction to consider and determine.

This is manifestly true because the Carmack amendment does not refer to the question of filing rates with the Interstate Commerce Commission.

The Act expressly provides that the carrier "shall issue a receipt or bill of lading." The bill of lading in this case was issued under the express requirement of this Act. The requirement that the rates must be filed with the Interstate Commerce Commission had been in force long prior to the passage of this amendment, but the Courts held that the Interstate Commerce Acts prior to the passage of the Carmack Amendment, did not abrogate state legislation and state policies on this subject, and that under these acts prior to the passage of the said amendment the filing of the rate by the carrier with the Interstate Commerce Commission did not give validity to limited valuations nor make a consideration of the same a federal question.

This was expressly decided in the case of Pennsylvania Railroad vs. Hughes, 191 U. S., 477.

~~As before stated~~, it was the passage of the ~~Carmack~~

Manifestly, it would be absurd to say that, although Congress had, pursuant to its constitutional right under the commerce clause, assumed direct control over this whole subject, yet the carrier might abrogate this law so far as it applied to it, by merely failing to do what the law required of it—that is, file its schedules with the Commerce Commission.

Suppose in this case, the accident and consequent loss had occurred on the Southern Railway, (the connecting

carrier.) Could the plaintiff in error have defended this suit on the ground that the Carmack Amendment did not apply, because it had failed to file its schedules of rates with the Interstate Commerce Commission? Certainly, such a defense could not be maintained.

Therefore, this Act of Congress does apply to this transaction. The right of defendants in error to recover against the plaintiff in error in this case arises alone out of this Act of Congress; all state laws and rules, both of the states of Kentucky and Tennessee, having been superseded and abrogated by the passage of this Act.

As stated by Mr. Justice Lurton,—"there must be uniformity in enforcing the rights of parties under this Act, and such rights cannot be made to depend upon the policies, laws, rules, or decisions of the various states."

If the rate has not been filed with the Interstate Commerce Commission, then the validity of the rate is subject to attack upon such grounds as are considered sufficient by this Court. Nevertheless, the limited valuation clause in the contract for interstate shipment is not governed by State statutes nor rules established by State Courts. These contracts will be enforced or rejected by uniform rules established by this Court.

Let us assume for the present that the schedule of rates in question was not filed with the Interstate Commerce Commission. This being true, are any of the grounds of attack made by the defendants in error in their declaration sustained by the record?

Obviously, the first ground of attack, to-wit: that the contract is void under the Constitution and laws of the State of Kentucky, is not good.

We have already discussed the second ground of attack which is that the property was worth a great deal more than the agreed valuation.

The third ground of attack was because the defendants in error were not offered any other rate and were given no option to ship under a common law contract without limitation on the amount of liability. The contract sued on provides:

> "That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase of fifty per cent in the freight rate; and
>
> "That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for." (Record, pp. 6-7.)

This was a sufficient offer of two rates:

> Railway vs. Harriman, 227 U. S. P. 668, *et seq.*

Here the shipper knew and for many years had been paying the same freight rate that he agreed to pay at the time of this shipment.

In each count of their declaration, defendants in error state that they agreed "to pay the full freight or tariff charged by defendant for such transportation."

So it is not pretended that there was any misunderstanding as to the rate they were to pay.

The contract, in express terms, provided that the shippers could declare an increased valuation. There was nothing to hinder the shippers from the declaration of any valuation they thought proper on their property. The rate for this increased valuation was clearly laid before them. They manifestly had an option to ship at the valuation of $75.00, or a valuation of $225.00 if they so desired.

The fourth ground of attack was that there was no consideration to sustain the limited valuation contract. It was expressly held in the case of *Hart vs. Pennsylvania Railroad, supra*, that the reduced freight rate was a sufficient consideration. This holding has been sustained by all the Federal Courts since the decision of the *Hart* case, and we apprehend this ground of attack will not be insisted upon.

The fifth ground was that the shipper and carrier were not on the same footing; that is, there was no rival carrier between the points of shipment, and the carrier was able to practically dictate terms to the shippers. Of course, this means nothing. If such an objection should be treated as good, then no contract between the carrier and shipper could be sustained unless there were rival lines between the points of shipping. This objection was not considered in any of the courts below, and we assume will not be relief upon here.

It will thus be seen that none of the grounds upon which this contract was attacked in the declaration of the de-

fendants in error are at all tenable under the holdings of this Court. It is, therefore, manifest that it was error to hold that this limited valuation was illegal.

Hence, regardless of the question as to whether or not the rate in question was filed with the Interstate Commerce Commission, the Supreme Court of Tennessee was in error in holding this contract invalid.

But, for another reason, the Court was in error in holding this contract invalid. It has been uniformly held by the Supreme Court of the United States that if the rates have been filed with the Interstate Commerce Commission, then their reasonableness can only be attacked in that forum. No court, state or federal, can consider the question of the reasonableness of the contract after it has been filed with the Interstate Commerce Commission.

> Railway Co. vs. Abilene Oil Co., 204 U. S., p. 426.
> Railway Co. vs. Coal Co., 215 U. S., p. 481

And so, in this case, if plaintiff in error had filed the schedule of rates containing the limited valuation set out in the bill of lading, with the Interstate Commerce Commission, their reasonableness could not be considered by the courts in this suit

The question of whether or not it will be presumed in the absence of any evidence on the subject that a railway company, subject to the terms of the Act to regulate Commerce (U.S.Comp. Stats., 1901, p. 3154; U. S. Comp. Stats., *Supra*, 1907, p. 892), has complied with the positive requirements of that Act and filed with the Interstate Commerce Commission its schedule of rates has, so far as we have been able to find, been passed upon by only two courts in the United States, both of them being federal courts.

The first case is Clement vs. L. & N. R. R. Co., 153 Fed.

979. This was a suit to recover damages by reason of the refusal of the railroad company to deliver three cars of lumber, which lumber the railroad company declined to deliver until certain charges demanded by it had been paid. There was a judgment for the defendant dismissing the suit. The Court says:

> "There is no allegation that the charge complained of is in violation to the tariff rates which it is the duty of the defendants to submit to the Interstate Commerce Commission and to post and act on when allowed by that body. The petition neither alleges nor denies that there was a duly filed and posted tariff rates applicable to the freight charges herein complained of. As the defendant is, and is averred to be, engaged in Interstate Commerce, it is the defendant's legal duty to comply with the requirements of the Interstate Commerce Commission Act. The petition does not suggest that this requirement has not been complied with, and the allegation that the discrimination is against all consignees under local bills of lading and under rules of a car service association irresistibly implies that the charge complained of was made under a tariff. In the absence of a positive charge, and of even an intimation in the petition that the defendant has violated the statute, by failing to post a tariff, I am bound to presume that the defendant has done what the statute requires, and has duly filed and posted its tariff, and that the charge complained of is made thereunder."

The second case is that of Meeker vs. Lehigh Valley R. Co., 162 Fed., 359. In that case, the Court sustained the demurrer to the bill, which sought to have certain rates declared unlawful. The Court says:

"It seems to me very plain that the Congress of the United States, having full power in the premises, has established this commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the transportation of Interstate Commerce are legal and what are illegal; that is what rates are proper and just and reasonable and what are improper, unjust, excessive, and consequently when so desired, illegal. It also seems clear to me that all compaining shippers are relegated to this commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness and reasonableness of the rates established, filed, published and posted. And I think it presumed, in the absence of averments to the contrary, that every common carrier engaged in Interstate Commerce, has complied with the law by establishing rates and printing, filing, publishing and posting them."

Confessedly, there was a contract of shipment in this case, written and signed by both parties. The positive mandate of the law required the Railway Company to charge, and the shipper to pay, the rate which had been filed with the Interstate Commerce Commission, and the giving or acceptance of any other rate would have been a violation of the law and would have subjected both the Railway Company and the shipper to a heavy penalty.

R. R. vs. Abilene Co., 204 U. S., 445, 51 L. Ed. 561;
R. R. vs. Hefley, 158 U. S., pp. 39, L. Ed. 910;
R. R. vs. Hugg, 202 U. S., 242, 50 L. Ed. 1012.

"It is a rule of a very general application that where an act is done which can be done legally only after the performance of some prior act, proof of

the latter carries with it a presumption of the due performance of the prior act."

Knox County vs. Ninth National Bank of N. Y., 147 U. S. 94, 37 L. Ed. 95.

"The presumption of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be admitted to be illegal where it is capable of a construction which will uphold it and make it valid."

1 Beach on Mod. Law of Contracts, Sec. 717.

"When a contract is valid, in the absence or existence of certain facts, but otherwise void, it is, in the absence of evidence, presumed to be valid, and the burden of proving the absence or existence of such facts lies upon him who asserts its invalidity."

Greenhood on Public Policy, Rule 130, p. 118.

"The law does not presume that parties to a contract intend by it to accomplish an illegal object but it rather presumes that they intend to accomplish a legal purpose."

2 Elliott on Contracts, Sec. 1061.

"That a business enterprise will not be undertaken until all necessary legal authority is procured . . . . . will be presumed or assumed." Chamberlayns' Mod. Law. of Evi., Vol. 2, Sec. 1056.

"Illegality of Contract. It is presumed that every man obeys the law, and, as a general rule, illegality

to be admissible, must be pleaded. It is never presumed."

Bradner on Evidence, p. 362, Sec. 25.

This presumption should especially be indulged in this case because the defendants in error attacked the validity of this rate on five specific grounds, but did not attack same on the ground that the rate had not been properly filed with the Interstate Commerce Commission.

CONCLUSION.

In conclusion we submit that the case should be reversed and remanded on the question of liability.

(a) Because the loss complained of was not "caused by" the defendant in error, but was the result of an unavoidable accident.

(b) Because the state courts were in error in holding that the defendant in error should be held in this case, to the "highest degree of care", for the protection of the property.

If liable at all, the amount of the judgment complained of, is erroneous. Defendants in error are only entitled to recover $75.00 for each of the animals lost, as provided for in the contract of shipment.

(a) Because the Court should presume that the schedule of rates providing for this limited valuation was properly filed with the Interstate Commerce Commission, as required by law, and in that event, this contract is not subject to attack in the state courts.

(b) If this presumption is not indulged and we assume the rate was not so filed, then the evidence does not sup-

port the holding of the state court that this rate was void, as a matter of law, on any of the grounds of attack set out in the declaration of defendants in error.

Respectfully submitted,

MICHEAL M. ALLISON,
JAMES J. LYNCH,
ISAAC G. PHILLIPS,
Attorneys for Plaintiff in Error.

EDWARD COLSTON,
of Counsel.

INDEX.

	PAGE
Action of Tennessee Supreme Court	14
Argument	19
Brief	14
Court of Civil Appeals Action	11
Pleadings	5
Trial Court Proceedings	9

Index to Cases Cited.

Adams Express Company vs. Croninger, 266 U. S., 491	18
Blitch Co. vs. Railroad Co., 87 S. C., 115	29
Brown vs. Fertilizer Co., 124 Ala., 221	28
Brown vs. Phelan, 32 Tenn., 629	19
Carter vs. Turner, 37 Tenn., 179	19
Chicago, Etc., Co. vs. Miller, 226 U. S., 513	30
Chicago, Etc., Ry. Co. vs. Latta, 226 U. S., 519	30
Clark vs. Small, 14 Tenn., 432	24
Clement vs. L. & N. R. R. Co., 153 F., 979	11-28
Cooke vs. Guirkun, 119 N. C., 13	28
Countez vs. Parkerson, 50 F., 170	23
Covington Stock Yards vs. Keith, 139 U. S., 128	17
DeGlopper vs. Light Co., 123 Tenn., 633	19
Douglas vs. Brandon, 65 Tenn., 58	19
Evans vs. Railroad, 111 Mass., 142	17
Fisher vs. Ins. Co., 124 Tenn., 487	28
Gaugh vs. Henderson, 39 Tenn., 629	19
Goldey vs. Railroad, 30 Pa., 242	17
Insurance Co. vs. Thornton, 97 Tenn., 11	15-16
Manning vs. John Hancock Co., 100 U. S., 693	19
Meeher vs. Lehigh Valley Co., 162 F., 359	11-28
Porterfield vs. Humphreys, 27 Tenn., 487	17

Railroad vs. Bank of Chicago, 123 U. S., 728 17
Railroad vs. Gurley, 12 Lea, 57 10-16
Railroad Co. vs. Hughes, 191 U. S., 477 26
Railroad vs. Lindamood, 111 Tenn., 458 19
Railroad vs. Lockwood, 17 Wall, 379 10
Railroad vs. Smith, 123 Tenn., 678 10
Railroad vs. Stone, 112 Tenn., 376 10-26
Railroad vs. Warfield, 129 Ga., 473 22-23
Railway vs. Harriman, 229 U. S., 657 30
United States vs. Ross, 92 U. S., 28 19
Xenia, Etc., Bank vs. Stewart, 114 U. S., 224 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 344.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,

Plaintiff in Error.

vs.

D. F. & T. C. RANKIN,

Defendants in Error.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

To the Honorable Court:

If we have regard to elementary pleading, it seems this case should be easily resolved because in law the questions on which the case turns are frivolous. Although it depends largely on Tennessee pleading, it is perhaps best at the outset to consider the facts. We cannot accept the statement thereof by adversary counsel, and it is deemed best to entirely re-state them.

I.

Defendants in error, the shippers, on November 6th, 1911, delivered to the Railroad Company, plaintiff in error, at Danville, Ky., a shipment of mules destined to Atlanta, Ga. The shippers had for some years previous occasionally shipped mules from Danville to the Southern markets. Arrangements for this shipment were made by D. F. Rankin, about 4:30 P. M. (R. 26) when the mules were taken to the station and placed in stock pens awaiting the arrival of cars. They were loaded about 10:00 P. M. that night (R. 28) and started southward over the line of railroad from Danville to Chattanooga. (R. 31.) On the following day at Dayton, Tennessee, 38 miles north of Chattanooga, and while in the carrier's possession, the train was derailed and 19 mules killed in the wreck. (R. 57.) The evidence tended to show that the train was running from 40 to 50 miles per hour (R. 69) through the town of Dayton, of some 3500 inhabitants, an ordinance of which town *prohibited* a rate of speed in excess of ten miles per hour. (R. 24.) A rule of the Company prohibited running more than six miles per hour through the town. (R. 62.) The train consisted of some 45 loaded freight cars, drawn by two engines, a "double header." (R. 63.) It could not be stopped under 700 to 800 feet at the rate it was traveling. (R. 65.)

While some cows were crossing the track at a grade or public street crossing within the corporate limits, a cow was struck, and the train was thereby wrecked. (R. 65-69.) The testimony is conflicting as to whether the cows were actually seen before the train was within seventy-five feet of them. (R. 69, 65, 59.) Accepting the theory of the company, the cows, although approaching the track

at a street crossing (R. 60, 61) were not seen until the train was from fifty to seventy-five feet away, because of some parked cars strung along the railroad side tracks immediately north and south of this crossing, which had been stationed there and the string of cars separated about fourteen feet to leave space for street crossing. (R. 59, 61.)

The track northward for half a mile or more was straight and level, and the cars *could be seen* by the engineer all that distance—and he *knew* of this grade crossing. (R. 60-61, 65.) Unless the cows were behind the cars he *could have seen* the former, and there is evidence tending to show the cows were on the track, in plain view a sufficient length of time for the engineer to have stopped before reaching them. (R. 68-69.) He claims he *did not see them* until one came suddenly in view. The track ran north and south and the street east and west. Assuming the cows were traveling eastward, as the engineer states, they *might* have been hidden by the parked cars which prevented the engineer seeing the crossing approaches for some distance westward, but there is evidence to the contrary. (R. 68-9.)

Accepting the view either (a) that the cows were on the crossing during the half mile run along the straight track to that point, or (b) that they could not be seen as they approached the crossing because of the parked cars, *it is clear the engineer was grossly negligent.* He was passing through the town with 45 laden freight cars, drawn by two engines, over a grade crossing with parked cars plainly visible a half mile distant on either side, unmindful of the probability that persons or cattle might suddenly appear on the crossing. The train was being operated in violation of statute, municipal ordinance and rules of the

Railway Company. The engineer knew a wreck was probable in event of a collision, and that the mules were liable to be injured in such event. It was *not unusual* for the train to strike cows. It was such a usual occurrence that the engineer testified as an expert, based on his experience, as to what should be done when cows appeared on the track—to *increase* rather than check the speed of the train, although this was *contrary to the rules of the Company.* (R. 67.)

When D. F. Rankin delivered the mules to the Company, the Agent at Danville made *no inquiry* as to their value. There was *no representation* of value made to him by the shipper—*save that which results, if any,* from the fact that the Agent partially filled one of the Company's blank bills of lading, and at the ticket window presented it to the shipper for signature. The shipper did not read it, did not know what was in it, but signed it. (R. 39, 41-42.)

The Agent retained it to deliver to Robert C. Rankin, who left on a passenger train the following morning for Atlanta, and went there to receive the mules and dispose of them for the shippers. (R. 36-7.) The Agent did deliver the bill of lading on the morning of November 7th, the mules being in transit. Robert C. Rankin went directly to Atlanta, but neither he, D. F. Rankin nor T. C. Rankin *ever read or knew* the contents of the bill of lading. Though the shippers had received bills of lading previously, they had never read one and did not know of the limitations therein, whereby their mules, which were worth from $225 to $250 each, were actually valued at $75 per head.

No rate was guaranteed or even specified in the bill of lading. (R. 7.) The *termini* of the carrier's road were not named. (R. 6.) The bill of lading was evidently an antiquated form which *limited* the carrier's liability to *"his own line only."* (R. 6.) It was plainly intended to contain a "guaranteed freight rate," but for some reason *no rate* was inserted therein. *No rate was either suggested or discussed. No question of liability was discussed.* (R. 7.) This is not explained. The Railway Agent was *not called* as a witness. The shippers proved there was no rate named or suggested. (R. 32, 42.) There was but the one line of railroad from Danville to Atlanta, and the shippers were compelled to either ship over it or drive their stock across the country to another line, an impracticable route, at prohibitive cost. During previous years one of the shippers had paid freight $95.00 per car to the carrier for transporting stock from Danville to southern points—whether under limitations imposed by the bill of lading in controversy, including the valuation clause, does not appear.

II.

THE PLEADINGS.

The declaration contained two counts. The first was a common law count on a general contract of affreightment, setting forth delivery of the mules to the carrier to be transported, the shipper *"agreeing* to pay the full freight or tariff charged by defendant for such transportation on delivery of said mules at the point of destination; and defendant *accepted* the mules for transportation on the *terms* aforesaid and *agreed* and become bound to safely

transport and deliver them in the same sound condition in which they were received," but wholly failed and instead negligently wounded and bruised the animals and "it is *believed* killed all or a portion of said mules, and failed and refused to deliver any of them at destination," and plaintiffs thereby lost the value of all said mules, reasonably worth $250.00 each over and above the cost and expenses of transportation, etc. (R. 2.)

The second count related the delivery to the carrier, the execution of the "written receipt or bill of lading, copy of which is here to the court shown, being filed as Exhibit No. 1 hereto, etc." (R. 3, 4.) After which were enumerated reasons why the $75.00 limitation in the bill of lading was invalid.

The carrier interposed seven pleas, the first of which was "not guilty," (R. 11) and which it now says (brief, p. 8) "is merely a denial of liability"—but as shown on pages 14-15 hereof, constitutes *no plea or defense to either count*. The second plea (R. 11) *admitted* the contract, but *denied* the breach thereof. The third went to the second count only, in that it traversed the attack made on the bill of lading. The fourth and fifth pleas were addressed to the second count only. (R. 11-12.) The sixth plea *admitted* (in that there was a failure to deny) the contract of carriage and the negligent breach thereof alleged in both counts, but brought forward as an affirmative defense that *the carrier had filed* with the Interstate Commerce Commission a schedule showing rates and charges for transportation of live stock; that the said schedule was in compliance with law, and that the freight rates named therein on car load lots of horses and mules—

"* * * * where the value of said horses and mules did not exceed $75.00 each, should be $95.00 per car, and that said regulations also provided that for every increase of one hundred per cent or fraction thereof in said valuations there should be an increase of fifty per cent in the freight rate. Plaintiff knowing these facts and in order to avail himself of said minimum freight rate of $95.00, fixed the value of each of said mules so shipped by him at $75.00 and represented to defendant that this amount was the just and true value of said animals. The defendant had no knowledge or means of knowing as to the value of said animals except as the same was derived from plaintiff or his agent; and plaintiff is now estopped from denying said valuation as thus fixed by him, and upon which is obtained said minimum freight rate, is unjust or unreasonable, and if liable for any amount defendant pleads these facts as a bar to any recovery in excess of $75.00 for each mule so injured in said shipment." (R. 12-13.)

The seventh plea averred compliance with the Interstate Commerce Act, a filing with the Commission of the carrier's schedule showing that the rates—

"* * * * * therein mentioned were based upon a valuation of not exceeding $75.00 for each mule or horse, and that the shipper is required to declare the value, and when the value so declared is in excess of $75.00 per head, an additional charge is made as provided in the classification, which is a part of said schedule. Said schedule and the tariff regulations approved by said Interstate Commerce Commission and in effect at the time, provided that for every increase of one hundred per cent or fraction thereof in said values there should be an increase of fifty per cent in freight rate. The rate charged on this ship-

ment was based upon the valuation of $75.00 for each mule, as declared by plaintiff."

The substance of this plea is the same as the sixth except it maintained that if the value of the stock was more than $75.00 per head the carrier was guilty of a wilful violation of the Interstate Commerce Act in fraudulently obtaining transportation "at an illegal rate through a suppression of information as to the true value thereof, and the law will not lend its aid to enforcing a demand having its origin in the breach of the law itself." (R. 13.)

The carrier subsequently filed two additional special pleas, VIII and IX. The first went to *only* so much of the second count as alleged "that the defendant sold all of said mules which had not been killed and appropriated and converted the proceeds of sale and still retains and has never accounted for the same." (R. 14.) The ninth plea is substantially like the sixth and seventh, the phraseology being slightly changed in an effort to exactly conform to the announcements in the Croninger, Miller and Latta cases (226 U. S. 491, 513, 519) then recently decided.

Evidently the carrier supposed the shippers would demur to the sixth, seventh and ninth pleas—thereby confessing their truth, as was done in the Croninger and other cases last above. But *instead the shippers joined issue* on these and the other pleas, (R. 17) thereby placing the *burden of proof* with respect to all the affirmative pleas on the carrier, as shown pages 18-19 hereof.

It resulted that the only defense interposed to the first count, and the only material defense to the second count,

was (1) a denial of the breach of contract of shipment and (2) a denial of liability in excess of $75.00 per head *because* of the affirmative matters shown in pleas six, seven and nine.

III.

TRIAL COURT PROCEEDINGS.

On the trial the Company offered *no proof* in support of its sixth, seventh and ninth pleas. (Clearly, it had not complied with the Interstate Commerce Act, as it had averred, or, the evidence being in its keeping, it would have offered it.) It maintained it was aided by a *presumption* of compliance with the Act. And it is perceived that to be available a four-fold presumption in its favor was necessary, namely, (a) that it had filed its schedule of rates based on valuations with the Commission; (b) that such schedule contained a rate intended to be inserted in the bill of lading (but which was not so inserted); (c) that such rate was based on the limited valuation clause of $75.00 per head, and (d) that the Commission had approved the schedule thus filed and it was consequently effective. In the absence of any proof of compliance with the Act, and the contents of the schedule alleged to be effective, the trial Judge observed to counsel during the argument:

> "There is no doubt in the mind of the Court but that if the Railroad were charged with a violation of the provisions of the Interstate Commerce Act a presumption in favor of its compliance would arise; but where the Railroad, as in this case, *sets up as a matter of defense* its compliance with the provisions of that Act, the Court is of the opinion that there is no pre-

sumption in its favor and that the burden of proof is on the defendant to show a substantial compliance with the provisions of the Act.

In the Croninger case there was a *demurrer* and what might be considered an intimation that something further was done by the defendant, and the Court, speaking through Mr. Justice Lurton, reviews the demurrer and speaks in regard to it, but it is only a surmise.

It therefore follows that under the facts in this case, the undisputed facts and the decisions of our courts on this subject, that the Court is of the opinion the contract in this case is invalid, and the question goes to the jury as to the *negligence* of the defendant on this shipment of stock." (R. 72.)

(*Note.*—Under the cases of *Railroad vs. Stone*, 112 Tenn. 376, quoting from *Railroad vs. Lockwood*, 17 Wall, 379, and *Railroad vs. Smith*, 123 Tenn., 678, the trial court was undoubtedly correct in its conclusion that the limitation in the bill of lading was void as matter of law *unless* there was a fourfold presumption favoring the carrier, as before shown.)

The Court submitted to the jury, first, the question of the Company's negligence, and, secondly, the value of the nineteen mules—and there was a *general verdict* of $4,508.82 for the shippers. (R. 73.) If there be doubt as to the correctness of the verdict, it will be assigned to any count of the declaration which will sustain it. Shannon's Code, Sec. 4694. *E. T. V. & G. Railroad Co. vs. Gurley*, 12 Lea, 57.

IV.

COURT OF CIVIL APPEALS ACTION.

The Court of Civil Appeals, in so far as the case turned on the limited valuation clause, held the burden of proof was on the carrier. (R. 108-9.) That Court considered the case of *Clement vs. L. & N. R. R. Co.*, 153 F., 979, and *Meeher vs. Lehigh Valley R. Co.*, 162 F. 359, relied on here by plaintiff in error (brief, p. 40) as favoring it with all needed presumptions. But having regard to the law of pleading in Tennessee, after a review of the cases last above and others, the court said: (R. 109)

> "We have, upon these authorities, no hesitancy in reaching a conclusion, and, in fact, it hardly appears debatable to us that it was incumbent upon the Railroad Company in this case, *in the present state of the pleadings* to show by proof that it had met the requirements of the Interstate Commerce Act; and this burden it failed to carry, and, having failed to do so, *it cannot rely upon presumption.*
>
> * * * *
>
> There being nothing in the record to show that the rate of freight charged by the Company was approved and authorized by the Interstate Commerce Commission, we must determine the rights of these parties upon the theory that no such rate was ever filed with the Commission, or approved or authorized by it, and that the rate and contract made in this case was without the authority and outside of the Act of Congress, invoked by this defendant; or, in other words, so far as the Interstate Commerce Act is concerned, this Railroad Company has made a contract in violation of its provisions, and, having so done, we do

not think the opinion of Mr. Justice Lurton for the Supreme Court of the United States, delivered January 6, 1913, in the case of Adams Express Co. vs. Croninger, is controlling."

* * * * *

"In this case there is no proof that the Railroad Company had any other rate than the one charged plaintiffs for this shipment from Danville, Ky., to Atlanta, Ga. There is no proof that it offered to plaintiffs at the time it issued them its bill of lading a contract with an unlimited liability, or, in other words, a common law liability. Indeed, the rate of freight charged in this case is *only inferable* from some of the statements made by the plaintiffs to the effect that they paid $95 per car for shipments from Danville, Ky., but they do not state to what point such shipments were made, nor on what valuation such rates were based, and hence we say the rate charged in this case, while the proof does not show what it was, is a mere inference, or a *presumption*, that it was $95 a car on a valuation of $75 for each mule shipped.

"The Supreme Court of Tennessee has held in several cases that if a contract of limited liability 'be fairly obtained, just and reasonable, and upon sufficient consideration, and the carrier at the time the contract was made was ready and willing to transport the freight with or without such limitation, such contract would in that case, be valid and binding upon the shipper' no matter whether he read it or not, or knew its contents. 112 Tenn., 348; 123 Tenn., 678. That Court has, however, held that where the valuation placed on stock in the bill of lading is not more than half or one-third its value, that such contracts are unreasonable, unfair, unjust and void.

"In this case the valuation placed in the bill of lading is $75.00 for each mule, while the proof over-

whelmingly sows that the mules were worth upon an average of $225.00, three times the value fixed in the bill of lading, and for that reason the trial Judge held the contract of limitation on the liability of the Company was unfair, unjust, unreasonable and void, and on this view of that question *this Court fully concurs.*

"The record shows without controversy that there was no pretense at the time the contract was made of fixing a value upon these mules. The Agents of the Company did not see them, nor undertake to put a value on any of them. The agent simply presented to the shipper a contract in which $75.00 value for each mule was inserted, signed by the Agent, and which was signed by the shipper. If the Company had any other rate than the one it agreed for the transportation of this freight, it did not disclose that fact to the shipper, nor did it have any rate whatever posted in or about its office. If it had a shipping contract with unlimited liability it did not choose between the two, and from the undisputed facts developed in this record it is clear to our minds this contract is void, and the limited liability clause therein cannot be relied upon by the Company as a bar to the recovery of full value of each animal shipped." (R. 109-111)

The Court of Civil Appeals, again referring to the Interstate Commerce Act, and saying if the facts set forth in the pleas of defendant were proven that the limitation of value contended for by the Company would obtain, said:

"But we have no such case before us, but simply a case where the Company, according to the proof in this record, without consulting the plaintiffs, and without seeing the animals, fixed a value on the stock and *charged just such rate of freight upon that valuation as it sees fit.* And in a case of that character the contract of shipment is governed by the common law, and not by the Interstate Commerce Act." (R. 107.)

It accordingly affirmed the trial court.

V.

ACTION OF TENNESSEE SUPREME COURT.

Certiorari was granted by the Supreme Court (R. 116) and before it the shippers contended, as here, with respect to the legal aspect of the pleadings, (R. 154-5), the character of the action, (R. 155) and the burden of proof. (R. 159-161.) And that the Company having offered no proof to sustain its sixth, seventh and ninth pleas, it could not claim exemption from liability predicated on the *assumption that those pleas were true.* In short, it could not prove a four-fold substantive fact by presumption. (R. 160-161, 163.) That in the absence of all proof the affirmative pleas must be disregarded.

The Supreme Court so held and accordingly adjudged "that there is no reversible error in the judgment of the Court of Civil Appeals and said judgment is in all things confirmed." (R. 165.)

* * * *

That the Tennessee Courts did not err against the carrier is confirmed by a study of the pleadings in the light of the citations contained in the following:

VI.

BRIEF.

(a) The action is founded on contracts, both counts proceeding thereon. The first count is based on a general verbal contract of affreightment. The second likewise declares on contract, exhibits the bill of lading and attacks

the limited valuation clause thereof for specific reasons. But both counts are on contract. *Hutchinson on Carriers* (2nd Ed.) Sections 741, 743-4; Caruthers Hist. Lawsuit, p. 119; Parks on Pl., p. 75-6; Shannon's Code of Tennessee, Sections 4609, 4660 (forms 8 and 13); *Insurance Co. vs. Thornton,* 97 Tenn., 11.

Judge Parks and Judge Caruthers both wrote treatises on the law of pleading in Tenenssee, and both assert that a declaration against a common carrier of substantially the same form as in this case, is a suit on contract. Both authors set out a form substantially like the present. (See citations above.) Shannon's Tennessee Code, Sec. 4609, provides:

> "Any pleading which conforms substantially to the forms attached to this part of the Code is sufficient."

And, under section 4660, are given various "forms of declaration," among others, one on "verbal contract" (form 8) and another "against a common carrier" (form 13).

(b) As the action is based on contract, the (first) plea of "not guilty" *is no plea.* In *Insurance Company vs. Thornton,* 97 Tenn., 11, the court said:

> "It would be impossible to find, we imagine, in any text book or cited case of recognized authority where the plea of 'not guilty' was admitted as a plea of the general issue to a declaration on *either* written or *unwritten* contracts."

The general issue is that the defendant "did not promise, undertake or agree and does not owe the plaintiff as in his

declaration alleged," etc. Shannon's Code, Sec. 4661 (form 3); Parks on Pl., p. 139; *Insurance Co. vs. Thornton*, 97 Tenn., 11.

(c) Shannon's Code, Sec. 4694, provides,

> "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts."

And the Supreme Court of that State has held that on review a judgment would be referred to any count of the complaint that would sustain the judgment. *Railroad vs. Gurley*, 80 Tenn., 57.

(d) It results that the judgment herein may be based on either or both counts. As to the first count on general contract, the *only* defenses interposed were (the first or alleged plea of "not guilty" being a nullity, *Ins. Co. vs. Thornton, supra.*) the second, sixth and ninth. Ultimately, it may make little difference whether the judgment be referred to the first or second count—but at present it narrows the scope of the investigation if it be referred to the first.

The second plea merely denies a *breach* of the contract of carriage—by inference admitting the contract averred. And the carrier before the Supreme Court of Tennessee in substance conceded there was no plea placing on the shipper the burden of proving the *general contract* alleged in the first count. (R. 164-5.)

And the contract and delivery of the mules being admitted, the only proof required of the shipper to make

out a *prima facie* case was failure to deliver. 6 *CYC*, 518, 519; *Hutchinson on Car.*, Sec. 765.

That the mules were delivered to the carrier in good condition was admitted by the plea. That they were not delivered at destination, but were killed at Dayton, was proven by the shipper. The carrier was burdened with "showing that the loss or injury occurred by reason" of an excepted cause, either under the common law or some exception made by the contract. 6 *CYC*, 519.

The proof offered by the carrier in an effort to escape liability did not show one of the excepted causes at common law. *Railroad vs. Bank of Chicago*, 123 U. S., 727-9; *Covington Stock Yards vs. Keith*, 139 U. S., 128, 137; *Porterfield vs. Humphreys*, 27 Tenn. (8 Hum.) 487; *Goldey vs. Railroad*, 30 Pa., 242; *Evans vs. Railroad*, 111 Mass., 142.

Thus, a case of *liability for some amount* depends on whether there has been such change in the common law as to relieve the carrier of all liability under the circumstances shown. We believe adverse counsel concede as much (brief, p. 27).

The carrier insists its common law liability has been so changed by the Interstate Commerce Act and the Carmack amendment thereto, as *to absolve it from all liability resulting from the negligence of its engineer* previously recited, and found to exist by the various courts of Tennessee. The carrier asserts that the words "caused by it" relieve it from liability resulting from (1) the dangerous condition at the grade crossing with parked cars on each side of the main line, plainly visible for half a mile, and

the known propensities of cattle, together with (2) the negligence of the engineer. It cites *Adams Express Co. vs. Croninger,* 266 U. S., 491, in support of its contention—but we do not so understand the language of the learned writer of the opinion therein, who in this connection said:

> "The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' *and plainly implies a liability for some default in its common law duty as a common carrier.*"

The primary position of the shippers is that the common law did not *exempt* the carrier from liability in this case; and, secondly, the loss in this case resulting from the dangerous condition which the carrier maintained at the grade crossing, together with the negligence of its engineer, constituted by any fair and natural interpretation, "loss, injury or damage *caused by it.*"

(e) The contract, loss, and liability being thus either admitted or proven, the amount of damage becomes material—and whether the limitation of value insisted on by the carried will be upheld. The shippers were met with pleas 6, 7 and 9, setting up full compliance with the Interstate Commerce Act, the filing of carrier's schedules with the Commission; that the rate alleged to have been intended to be charged the shippers was embodied therein; that it was *based on* a valuation of $75 per head from Danville to Atlanta; and that it was approved by the Commission.

Issue was joined on these pleas, but no proof was offered in support thereof. In Tennessee, as at common law, the party tendering such an issue is burdened with proving it.

It does not admit of argument that a special plea, or one setting up an affirmative defense, *imposes the burden of evidence on the party introducing such plea. Gaugh vs. Henderson*, 39 Tenn., (2 Head) 629; *Brown vs. Phelan*, 32 Tenn. (2 Swan), 629; *Carter vs. Turner*, 37 Tennessee (5 Sneed), 179; *Douglas vs. Brandon*, 65 Tenn. (6 Bax) 58.

(f) The carrier offered only one presumption based upon other presumptions in support of its sixth, seventh and ninth pleas. The case in all the Tennessee Courts turned largely on the condition of the pleadings and the burden of proof. It is elementary that a plea bringing forward a substantive fact is not supported by one presumption based on another or other presumptions. 16 CYC pp. 1050-1. *United States vs. Ross*, 92 U. S., 28. *Xenia etc. Bank vs. Stewart*, 114 U. S., 224. *Manning vs. John Hancock etc. Co.*, 100 U. S., 693. *Railroad vs. Lindamood*, 111 Tenn., 458. *DeGlopper vs. Light Co.*, 123 Tenn., 633.

VII.

ARGUMENT.

If we consider the first count only, the issues are narrowed in that pleas three, four, five and eight go *only* to the second count. But in any view the suit is based on contract and there is no plea denying the contract. (See pages 14-15 hereof.) As there is no plea of the general issue, and every averment of the complaint not denied is admitted—it follows that the second plea denying a *breach* of the contract *admits its making*. The carrier apparently so conceded before the Supreme Court of Tennessee, (R.

164-5) but confined its admissions to the controversy presented by the second count.

On either count we think the issue of negligence becomes immaterial, and plaintiff in error seems to now so concede *unless* the Interstate Commerce Act directly and positively changes the common law liability. On page 27 adverse counsel's brief they say "We concede that if the common law rule as to the liability of carriers was not changed by the Carmack Amendment, then there is no error in the conclusion reached by the Supreme Court of Tennessee that the plaintiff in error is liable in this case."

And the carrier's contention that the common law liability was changed by the terms of the Act seems to hinge on the language used by the lamented Judge Lurton in the Croninger case, defining the phrase "loss or damage caused by it," which he said "*plainly* implies a liability for some default in its *common law duty* as a common carrier." We think his language too plain to admit of doubt.

If the contract is admitted by the pleadings, as here, (or if denied and proven, as here) then a failure to deliver the goods received for transport by a carrier, at common law shifts to the carrier the burden of showing that the loss was not caused by the act of God or the public enemy. And as to live stock there was a further exception that the carrier was not liable if the loss resulted from vicious habits of the stock or disease. There is no pretense in this case that the loss complained is excepted from the rule of common law liability.

It is further *conceded* by the carrier (brief p. 27) that the trial judge was correct in his instructions that the car-

rier was held to the "highest degree of care" *unless* the Carmack Amendment changed the care imposed by the common law so as to reduce the measure thereof. We cannot believe such was the intention of Congress and we find no utterance by this Honorable Court or any other so implying. We insist the language of Judge Lurton above was directly to the contrary.

But for argument conceding the carrier's contention that the words "caused by it" reduced its common law liability, we reach the carrier's contention in substance that the trial court erred in holding it liable "although said loss was *not caused* by negligence of it, its agents or employees." We do not understand the trial court to have held any such thing. There was no controversy as to liability resulting otherwise than from the *negligence of the carrier, its agents and employees.* That was the only matter at issue with respect to the circumstances of the loss. And clearly a case of the most flagrant violation of duty and positive negligence was made out.

The mules were loaded in a train of some forty freight cars, drawn by two engines, sent thundering through the heart of the town of Dayton at 45 miles per hour, without regard to grade crossings; with knowledge of parked cars on either side of the main track, preventing the lookout or engineer commanding a view of the approaches to this crossing. The track was unfenced and the crossing a public one. The carrier's rules forbade running more than *six* miles per hour at this point, and the ordinances of the city more than *ten* miles per hour. The speed of the train prevented stopping it short of 800 feet. It was running through a congested portion of the carrier's yard. The dangerous condition thus made and maintained by the car-

rier, coupled with the reckless conduct of the engineer, assuredly made a clear case of *loss caused by the carrier.* There was no other cause. *The cow crossing the tracks was only a remote cause.* Hence, liability is clearly fixed regardless of what construction may be given the words "caused by it." As respects the carrier, this loss was *"caused by it."*

The Court of Appeals of Georgia, in 1909, in a case where damages were claimed for death of a horse *in transitu* and where the carrier contended, as here, that such death was not "*caused* by it," said:

> "The court in effect instructed the jury that the delivery to the carrier and the death of the horse *in transitu* having been conceded, the carrier would be liable, unless it could show that the death of the horse was occasioned by the act of God, the public enemy, or natural vices or propensities of the animal itself, and without negligence on the part of the carrier. He further told them that if the horse died from natural causes the carrier would not be liable. The plaintiff in error objects to the basis of liability stated. Counsel present the point that under the clause of the Hepburn act involved in this controversy, the initial carrier is liable not as an insurer, but only for 'any loss, damage or injury *caused* by it,' etc.; and from this he argues that the liability imposed upon the initial carrier by the Federal statute is neither the liability which existed at common law in the absence of special contract, and which made the carrier an insurer save only as to the act of God and the public enemy, and, as to live-stock shipments, save also as to the inherent vices of the animals themselves (see *L. & N. R. Co. v. Warfield,* 129 Ga., 473, 475, 477) (59 S. E. 234), nor that liability for which carriers might specially contract at common law, but is a new

and distinct liability; that is, a responsibility only for losses, damages and injuries caused by acts done by itself and connecting carriers. This view does not commend itself to our judgment. As we endeavored to point out in the *Crenshaw* case, *supra*, we think that Congress intended to adopt, as against the initial carrier, in interstate shipments, the ordinary common-law liability, and to deny the common-law right to contract for special exemptions therefrom. It is true the statute speaks of losses and damages 'caused' by the carrier; but it must be kept in mind that the law was dealing with carriers, a class upon which already rested, by general law, an affirmative duty to receive goods, to transport them safely, and to protect them from outside interference. When used of a person or other subject charged with an affirmative duty of care and diligence, or of good conduct so to speak, the word 'caused' implies not only active misconduct and deeds of commission, but also passive neglect, deeds of omission, and failures to exercise duties faithfully. *Carroll vs. Allen*, 20 R. I. 144 (37 Atl. 704); *Comitez vs. Parkerson*, 50 Fed., 170, 171. Any injury that a common carrier permits to befall the property while in its custody, otherwise than through the act of God or the public enemy, is in a juridic sense caused by it."

L. & N. Railroad Co. vs. Warfield, 6 *Ga. App.* 553-4.

We respectfully urge the reasoning above as aptly expressing our contention on this record.

The final contention of the Company is that its maximum liability is fixed by the valuation clause in the bill of lading. We have shown that the burden of proof was on the carrier under the pleadings to prove its compliance with the Commerce Act. We are not concerned as to whether they *might* have been shaped differently—they were not. The carrier framed its pleadings according to its then view of the facts and the law, and in doing so *took*

upon itself the burden of proving the affirmative matters contained in the sixth, seventh and ninth pleas. It offered nothing to support them.

Without violating the uniform rules of procedure and evidence in Tennessee, and overturning all precedents, the courts of that state could reach no other conclusion save that the carrier had the burden of proving its pleas; and that it could not prove them by the structural presumption shown pages 18-19 hereof. This phase received most careful consideration by the Court of Civil Appeals. (R. 109-111.)

The carrier's brief (p. 36) contends "the Act expressly provides that the carrier 'shall issue a receipt or a bill of lading.' The bill of lading in this case was issued under the express requirement of this Act." That statement is pure assumption. There is absolutely no evidence to support the statement. Furthermore, the bill of lading *did not purport* to be issued under the Act or pursuant to the Carmack amendment, because that amendment imposed on the carrier liability not only on its own line, but on that of a connecting carrier, *whereas* this bill of lading expressly limited "Carrier's Liability" to *"his own line only."* Again, the Act requires that the bill of lading set forth the rate of freight charged, but in this instance *no rate* ever was shown or guaranteed. If for no other reason the limitation of value should fail because utterly lacking in mutuality. 9 CYC. 244-5. 39 CYC. 686. *Clark vs. Small*, 14 Tenn., (6 Yer.) 432.

The Court of Civil Appeals pointed out that unless the carrier complied with the Interstate Commerce Act it could not claim exemptions thereunder. (R. 110-111.)

And it found that there was no pretense of valuing the animals by the shipper, offering of different rates by the carrier, or anything more than an *arbitrary valuation by the carrier and a charging of freight accordingly.* It correctly said that the carrier "without consulting the plaintiff and without seeing the animals, fixed a value on the stock and charged just such rate of freight, based upon that value, *as it sees fit.*" (R. 111.)

As the rate the carrier says it *intended* to charge ($95.00 per car) is not shown to have even been proposed to the Commission, upon what theory can it be reasonably argued the Railroad should escape liability for the full value of this stock? Adverse counsel say (brief, p. 37): "If the rate has not been filed with the Interstate Commerce Commission, then the validity of the rate is subject to attack *upon such grounds* as are considered sufficient by this court. Nevertheless, the limited valuation clause in the contract for interstate shipment is not governed by state statutes nor rules established by state courts. These contracts will be enforced or rejected by uniform rules made by this court." The quotation *assumes* a species of *exemption* to the carrier springing from the Act, despite the admitted fact that the carrier refused to comply with it. How can it claim an exemption under the Act based on compliance with its terms when it admits non-compliance? It seems to us, as the Court of Civil Appeals said, that if the provisions of the Act are not controlling because of the carrier's non-compliance, then "the contract of shipment is governed by the common law and not by the Interstate Commerce Act." (R. 111)

And if the Act does not apply, what federal question is presented, and why should there be a departure from the

administration of law in Tennessee as it existed prior to the application of the Act? This question seems put at rest by the opinion in *Pa. R. Co. vs. Hughes*, 191 U. S., 477. Under it the administration of law according to the understanding and interpretation of the Tennessee Courts is not subject to review here, unless this controversy is determinable by the Interstate Commerce Act. *Wherefore* we contend this case turns on no federal question, and presents only a frivolous controversy.

The Supreme Court of Tennessee, before the application of the Commerce Act, held a provision in a bill of lading like the present, which arbitrarily valued stock at one-third the real value, even though freight rates were guaranteed, was not "fair and reasonable." It is worthy of note that the conclusion thus reached was in part influenced by a decision of this Honorable Court. Thus, in *Railroad vs. Stone & Haslett*, 112 Tenn., 377, the Court said:

> "The evidence shows that the hogs shipped were worth two and three times the valuation inserted in the written contract. In view of the fact that the shipper has to accept the contract tendered by the carrier in order to get reduced rates of shipment, and has little to do with formulating the details of the contract, the Courts hold that such limited liability contracts cannot be enforced by the carrier unless they are *fair and reasonable*.
>
> "As stated by Mr. Justice Bradley in *Railroad vs. Lockwood*, 17 Wall., 379, 'The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in court. His business will not admit of such course. He prefers

rather to accept *any* bill of lading or sign any paper the carrier presents.'

"In view of the real value of these hogs at date of their shipment, we cannot think that a valuation clause of $5 per head is a reasonable stipulation."

So much more reason here, where (1) no freight rate obtained, and (2) no option to ship at a different rate was offered. There was no valuation of the stock. No questions were asked. The printed shipping bill was filled out and tendered for signature. It was not read and its contents were unknown. Its terms do not purport to be in compliance with the Interstate Commerce Act—*contra* the liability of the carrier is limited to its own line. There is not even a recital that the rate expected to be charged or the valuation therein printed had been sanctioned by the Commission, or indeed had been submitted to the Commission. The stipulation is "That the *published* freight rates on live stock of said carrier are in all cases based on the following maximum calculations which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for. . . . . That the tariff regulations of said carrier provide that for every increase of 100% or fraction thereof in the above valuations there shall be an increase of 50% in the freight rate; and that the said shipper, in order to avail himself of said *published* freight rates, agrees that said carrier shall not in any case of loss or damage to said live stock, be liable for . . . . any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals," etc. (R. 6-7)

There is no evidence as to what "the published freight rates on live stock of said carrier in all cases" were.

Neither is there any evidence that the rate which the carrier expected to insert in the bill of lading was according to the "published freight rates."

And what is meant by "the tariff regulations of said carrier" does not appear. The shippers, of course, had no knowledge on the subject of "published freight rates." They testified they had never seen any. And they disclaimed any knowledge of 'the tariff regulations of said carrier."

The carrier failed to make any explanation. It did not offer the agent who made the contract. It offered no "regulations." It offered no evidence which might explain the terms above. Obviously, it had "published freight rates" and it likewise had tariff "regulations" of its own—but as to whether they had ever been even proposed to the Commission or, if so, whether they had been approved by it, there is no evidence. The carrier had better facilities and greater means of knowledge for proving the affirmative defense contained in its pleas than did the shipper to prove a *negative*. And the failure to prove its pleas or offer any evidence of the fact that the "published freight rates" and the "tariff regulations" referred to were legally authorized re-acts with special force against it. *Fisher vs. Ins. Co.*, 124 Tenn., 487. *Brown vs. Fertilizer Co.*, 124 Ala., 221. *Cooke vs. Guirkun*, 119 N. C., 13.

In support of its request that a dual presumption be indulged in its favor, the carrier appeals to cases of *Clement vs. L. & N. Railroad Co.*, 153 Fed., 979, and *Meeker vs. Lehigh Valley R. Co.*, 162 Fed., 359. They were considered by the Tennessee Court of Civil Appeals (R. 109) and their non-application to the case at bar there pointed out.

The court deciding the Clement case said there was not "a positive charge or *even an intimation*" that the Interstate Commerce Act had not been complied with. The burden in that case was on the plaintiff who had attacked the rates and regulations of the carrier. Here, the burden is on the defendant, who has claimed an exemption.

In the Meeker case, the court said it would presume "in the absence of *averments* to the contrary, the law had been complied with."

It is fairly inferable from both cases that had the situation and pleadings of the parties been as in the present controversy, the courts would have resolved it as have the Tennessee courts. And particularly had *no rate* been either quoted, guaranteed or proven. It is interesting to note what the Court of Civil Appeals says on this point, namely, that—

> "In this case, there is no proof that the Railroad Company had any other rate than the one charged plaintiffs. . . . . There is no proof that it offered the plaintiffs . . . . . a contract with an unlimited liability, or, in other words, a common law liability. Indeed, the rate of freight charged in this case is only inferable from some of the statements made by the plaintiffs to the effect that they paid $95 per car for shipments from Danville, but they do not state to what points such shipments were made nor on what valuation such rates were based, and hence we say the rate charged in this case, while the proof does not show what it was, is a mere inference or presumption that it was $95 a car on a valuation of $75 per each mule shipped." (R. 110)

The case of *Blitch Company vs. Railroad Company*, 87

S. C., 115, is somewhat in point. A suit was there brought to recover of carriers an over-charge on an interstate shipment. The carriers demurred—and it did not appear whether the carriers had filed with the Commission the rate attacked by the claim for overcharge.

The Supreme Court of South Carolina said:

> "It will be observed that the complaint does not allege an unreasonable and unjust exaction for services in transportation based upon a rate established for an interstate shipment by the Interstate Commerce Commission, and there is *no presumption* that the defendants had filed with the Commission a schedule of freight rates, including charges for icing, and that such rates were promulgated, as required by the Interstate Commerce Act."

We have seen the Tennessee courts uphold limited liability contracts when they are "fair and reasonable." And had the carrier complied with the Act by proposing rates based on valuations to the Commission, received its sanction, and charged that rate, we would not argue against such rate. The law would presume it "fair and reasonable." But when compliance with the Act is *pleaded* and *non-compliance is shown* as the result of a failure to support the plea, does not the contrary inference arise, namely, that both the rate and valuation are *not* "fair and reasonable"? And would this not result as matter of law, independent of the interpretation placed on the contract of shipment by the Supreme Court of Tennessee?

The cases of *Chicago, etc. Railway vs. Latta*, 226 U. S. 519, *Railway vs. Harriman*, 229 U. S., 657, and *Chicago, etc. Co. vs. Miller*, 226 U. S., 513, have no application, because in all those cases there was a conceded compliance

by the carrier with the Commerce Act. Besides, the decisions were there in part rested on the ground that to grant the demands of the shippers would be to place a premium on injustice—for that (1) the carrier had in good faith complied with the Act, and (2) the shippers had *declared valuations to obtain reduced rates.* The facts are wholly dissimilar to the case at bar.

We earnestly submit this case is easily distinguishable; and that it was correctly decided by the Tennessee courts.

Respectfuly submitted,

W. B. MILLER,

Attorney for Defendants in Error.

CHAS. C. FOX,

Of Counsel.